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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19~~43~~44

No. 81~~2~~3

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

FILED MARCH 23, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 811

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

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560908—44——1

1 In the District Court of the United States
for the District of Delaware

Criminal Action No. 407

UNITED STATES OF AMERICA

vs.

MARGARET M. JOHNSON AND MARY R. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON

Docket entries

1944

1. Jan. 26—Criminal Information, with affidavit of Stewart Lynch, filed.
2. Jan. 26—U. S. Atty. Lynch moves for Bench Warrants; same day order of Court that Warrants issue and that defendants be held in bail of $1,000.00.
   Jan. 26—Bench Warrants issued (exit papers to Marshal).
3. Feb. 1—Appearance of H. Albert Young and Alexander Jamison as Counsel for the defendants, filed.
4. Feb. 1—Demurrer, Motion to Quash and plea in Abatement on behalf of all defendants, filed.
   Feb. 2—Hearing on defendants' Motions to Quash, etc.
4A. Feb. 2—Order of Court granting Motion of defendants to Quash, etc., filed.
5-7.6-Feb. 8—Marshal returns on Bench Warrants, Non Est.
8. Mar. 3—Government's petition for Appeal, filed.
9. Mar. 3—Government's Statement as to Jurisdiction under Rule 12 of Supreme Ct. of U. S., filed.
10. Mar. 3—Government's Assignment of Errors, filed.
11. Mar. 3—Order of Court allowing Appeal, filed.
12. Mar. 3—Citation on Appeal and Notice of Service on Appellees, filed.
13. Mar. 3—Designation for Transcript of Record by Appellant, filed.

2 In United States District Court

[Title omitted.]

Excerpts from Minutes of February 2, 1944

PRESENT

Hon. PAUL LEAHY, U. S. District Judge.

APPEARANCES

Stewart Lynch, Esq., United States Attorney; H. Albert Young, Esq., attorney for defendants.

SUBJECT

Hearing on defendants' motion to quash, etc.

ARGUMENT

Mr. Young for the motion. Mr. Lynch against the motion.

The Court stated an order should be submitted in conformity with the Court's opinion in Criminal Action No. 296.

3 In United States District Court

Criminal information

Filed Jan. 26, 1944

STATE AND DISTRICT OF DELAWARE, *ss:*

Stewart Lynch, United States Attorney in and for the District of Delaware, who, for the said United States in this behalf prosecutes, in his own proper person comes into Court on this 26th day of January A. D. 1944, and with leave of the Court first had and obtained, gives the Court here to be informed that heretofore, to wit, on or about the 25th day of August 1943, the defendants, Margaret M. Johnson and Mary E. Layton, doing business as the Unted States Dental Company and Voyle Clark Johnson, hereinafter referred to as defendants, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in Interstate Commerce, did use the United States Mails for the purpose of sending a set of dentures from the State of Illinois into the State of Delaware, the laws of which State prohibit the taking of impressions or casts of the human mouth by a person not licensed under the laws of the

State of Delaware to practice dentistry and likewise prohibits the construction or supply of dentures by a person other than or without the authorization or prescription of, a person licensed under the laws of said State to practice dentistry and also prohibits the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of the State of Delaware to practice dentistry (Revised Code of Delaware, 1935, Chapter 30, Sections 23 and 26), that is to say, the said defendants, on the day first aforementioned, did deposit at the Wicker Park Station, a branch of the United States Post Office at Chicago, Illinois, for delivery to Alice Harris, R. F. D. #1, Box 20,
4 Houston, Delaware, and within the jurisdiction of this Insured Parcel No. 6169824, containing a set of dentures made or constructed from an impression taken by a person, viz, the said Alice Harris, she not being a person licensed under the laws of the State of Delaware to practice dentistry, the said set of dentures so mailed by the defendants as aforesaid, not being constructed by or under the authorization of or pursuant to a prescription of a person licensed under the laws of the said State of Delaware to practice dentistry, contrary to the form of the Statute (Act of December 24, 1942, C. 823, Sec. 1, 56 Stat. 1087, Title 18 U. S. C. A., Sec. 420f) in such cases made and provided, and against the peace and dignity of the United States of America

COUNT II

That on or about the 25th day of August 1943, the defendants, Margaret M. Johnson and Mary E. Layton, doing business as the United States Dental Company, and Voyle Clark Johnson, hereinafter referred to as defendants, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in Interstate Commerce, did use the United States Mails for the purpose of sending a set of dentures from the State of Illinois into the State of Delaware, the laws of which state prohibit the taking of impressions or casts of the human mouth by a person not licensed under the laws of the State of Delaware to practice dentistry and likewise prohibits the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of said State to practice dentistry and also prohibits the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of the State of Delaware to practice dentistry (Revised Code of Delaware, 1935, Chapter 30, Sections 23 and 26), that is to say, the said defendants on the day first aforementioned, did deposit at the Wicker Park Station, a branch of the United States Post Office at Chicago,

Illinois, for delivery to Alice Harris, R. F. D. #1, Box 20, Houston, Delaware, and within the jurisdiction of this Court, Insured Parcel No. 6169824, containing a set of dentures, which insured parcel No. 6169824, so mailed as aforesaid was then transmitted in due course by the Post Office Establishment of the United States to and into the State of Delaware, to wit, to and at Houston, Delaware, and within the jurisdiction of this Court, the aforementioned set of dentures contained in the aforedescribed insured parcel having been made or constructed from an impression taken by a person, viz, the said Alice Harris, she not being a person licensed under the laws of the State of Delaware to practice dentistry, the said set of dentures so mailed by the defendants, as aforesaid, not being constructed by or under the authorization of or pursuant to a prescription of a person licensed under the laws of the said State of Delaware to practice dentistry, contrary to the form of the Statute (Act of December 21, 1942, C. 823, Sec. 1, 56 Stat. 1087, Title 18 U. S. C. A., Sec. 420f) in such cases made and provided, and against the peace and dignity of the United States of America.

5

COUNT III

That on or about the 25th day of August 1943, the defendants, Margaret M. Johnson and Mary E. Layton, doing business as the United States Dental Company, and Voyle Clark Johnson, hereinafter referred to as defendants, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in Interstate Commerce, did use the United States Mails for the purpose of bringing a set of dentures from the State of Illinois into the State of Delaware, the laws of which state prohibit the taking of impressions or casts of the human mouth by a person not licensed under the laws of the State of Delaware to practice dentistry and likewise prohibits the construction or supply of dentures by a person other than or without the authorization or prescription of a person licensed under the laws of said State to practice dentistry, and also prohibits the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of the State of Delaware to practice dentistry (Revised Code of Delaware, 1935, Chapter 30, Sections 23 and 26) that is to say, the said defendants on the day first aforementioned, did deposit at the Wicker Park Station, a branch of the United States Post Office at Chicago, Illinois, the same being a part of the Post Office Establishment of the United States, Insured Parcel No. 6169824,

6

addressed to Alice Harris, R. F. D. No. 1, Box 20, Houston, Delaware containing a set of dentures which had been made or constructed from an impression taken by a person, viz, the aforementioned Alice Harris, she not being a person licensed under the laws of the State of Delaware to practice dentistry, for the purpose of having the Post Office Establishment of the United States bring the said set of dentures from the State of Illinois to and into the State of Delaware, to wit, to the said Alice Harris, R. F. D. No. 1, Box 20, Houston, Delaware, and within the jurisdiction of this Court; and the said Post Office Establishment of the United States did, in due course of the United States Mails, and pursuant to the directions set forth by the defendants on the aforementioned insured parcel No. 6169824, bring the said Insured Parcel No. 6169824 and its enclosure, i. e., a set of dentures made and constructed as aforesaid, to and into the State of Delaware, to wit, to the said Alice Harris, R. F. D. No. 1, Box 20, Houston, Delaware, and within the jurisdiction of this Court, the said set of dentures so mailed by the defendants as aforesaid not being constructed by or under the authorization of or pursuant to a prescription of a person licensed under the laws of the said State of Delaware to practice dentistry, contrary to the form of the Statute (Act of December 24, 1942, C. 823, Sec. 1, 56 Stat. 1087, Title 18 U. S. C. A., Sec. 420f) in such cases made and provided, and against the peace and dignity of the United States of America.

(s) STEWART LYNCH,
United States Attorney,
District of Delaware.

7 UNITED STATES OF AMERICA,
District of Delaware, ss:

Before me, the undersigned, Clerk of the United States District Court for the District of Delaware, personally appeared Stewart Lynch, United States Attorney for the District of Delaware, and made oath in due form of law that the matters and facts set forth in the foregoing Information are true, to the best of his knowledge, information and belief.

(S) STEWART LYNCH.

Sworn to and subscribed before me this 26th day of January A. D. 1944.

[SEAL OF COURT] (S) T. M. BEAUCHAMP,
Ch. Dep. Clerk, United States District Court,
District of Delaware.

8 In United States District Court

Demurrer, motion to quash, and plea in abatement

Filed Feb. 1, 1944

Now come the defendants, Margaret M. Johnson and Mary E. Layton, doing business as the United States Dental Company, and Voyle Clark Johnson, on petition of H. Albert Young and Alexander Jamison, their attorneys, and demur to the information in the above-entitled cause and move to quash the said information and for a plea in abatement with reference thereto say that the information should be quashed and held for naught and that the United States of America take no further cognizance of nor further prosecute for the matters set forth in said information and that the said defendants ought not to be further held to answer the said information and that the same should abate, and for such grounds respectfully show the Court:

1. That the federal statute under which this information was returned against the defendants herein is vague, uncertain, indefinite, broad and ambiguous and, therefore, invalid.

2. That the information filed herein is vague, ambiguous,
9 indefinite, uncertain and illogical; that the said information is insufficient in law and does not charge a criminal offense.

3. That the state act upon which this prosecution depends is vague, uncertain, indefinite, broad, and ambiguous.

4. That the federal statute under which this information was filed must by its terms find support in a valid statute of the State of Delaware; that the clauses contained in section 23 and section 26 of the Delaware State Law entitled, "An Act to Amend, Revise, and Consolidate the Laws Regulating the Practice of Dentistry, Dental Surgery, and Oral Hygiene in This State * * *", 38 Laws of Delaware 240, Chapter 48, are invalid for the reasons that:

(a) Sec. 26 of the Act does not prohibit nor make unlawful the taking or making of impressions of one's own teeth.

(b) The Act fails to define the meaning of practicing dentistry as embracing within its scope the act of one taking impressions of his own teeth.

(c) The "authority" and "responsibility" conferred upon registered practitioners of dentistry by Sec. 23 of the Act is invalid as being an arbitrary delegation of authority for the reason
10 that such wide and discretionary power leaves to any registered practitioner of dentistry the unbridled authority without control or limitation and without a reasonable standard or adequate yardstick to guide him, to make lawful or unlawful the entry into the channels of interstate commerce purely commercial prod-

acts which would otherwise constitute lawful articles of commerce.

(d) The Act in defining "dental operations" does not include work embraced in the business of mechanical dentistry and thereby demonstrates that the Act never intended to regulate or control the business thereof.

(e) The Act is invalid in that it attempts to regulate the manufacture, sale and supply of dentures which is a purely mechanical art or business in which any person has the right to engage as distinguished from the practice of dental surgery, etc., which is a profession; the former cannot be abrogated by law in the guise of protecting the public interest; in other words, the law cannot
11 interfere with the right of one to lawfully engage in a common and useful occupation for which he is qualified.

(f) The Act is fatal in that the title thereof does not reasonably disclose the intent to regulate the business of the manufacture, sale, and supply of dentures.

(g) The Act is unconstitutional because it lacks completeness and certainty; it leaves the definition, explanation, standards, and final decision concerning the matter about which it purports to legislate, to any licensed registered practitioner of dentistry and is consequently an attempt by the Legislature to make an improper delegation of legislative power in violation of Article II, Section 1, of the constitution of the State of Delaware.

(h) The Act insofar as it fails to define the meaning of "taking impressions for the replacement of teeth" and the meaning of "making it unlawful for any person to repair, construct, adjust, or alter any appliance, denture, or dental restoration except
12 under the authority and responsibility of a registered practitioner of dentistry" by leaving to such registered practitioner of dentistry the absolute power and sole discretion to determine when an individual rightfully engaged in the lawful business of mechanical dentistry becomes amenable to both the state and federal laws is an arbitrary and invalid delegation of authority; and by so doing, leaves to such registered practitioner of dentistry of this State as well as to the State itself the power of determining when an article in question, the manufacture, construction, and supply of which, lawful in themselves, becomes unlawful when shipped in interstate commerce, and is, therefore, in violation of Article II, Section 1, of the constitution of the State of Delaware which provides:

"The legislative power of this State shall be vested in a general assembly which shall consist of a Senate and a House of Representatives."

(i) The repair, construction, adjustment, or altering of any appliance, denture, or dental restoration embracing the
13 mechanical phase of dentistry as distinguished from dental

surgery and treatment of the human mouth is a lawful business and to prohibit one from engaging in such lawful business unless authorized by a registered practitioner of dentistry to do so without any adequate or reasonable standard to guide him or control him in determining the qualifications of one so engaged, is an arbitrary invasion of the personal rights and liberty of a citizen to engage in a lawful occupation and as such is in violation of the Bill of Rights as contained in Article I, Section 7, of the constitution of the State of Delaware and as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

(j) The state Act fails to set up an ascertainable standard of guilt and is, therefore, invalid.

5. The act of congress upon which this information is based is a penal statute and is indefinite and uncertain in that it authorizes any registered practitioner of dentistry in any state or territory without any guide or reasonable standard to determine whether or not the movement of certain articles in interest commerce may be permissible.

14 6. The act of congress upon which this information is based is not within the power of congress to regulate commerce among the several states.

7. The State Act insofar as it attempts to regulate the business of a mechanical dental laboratory is unconstitutional and void as conferring a special privilege, immunity, and franchise upon a special class of citizens and is, therefore, class legislation insofar as it attempts to confer a monopoly upon the dental profession; that in so doing, such legislation deprives the defendants of their property without due process of law as defined in the state and federal constitutions.

8. The state act under consideration being a penal statute, it will not be presumed that the Legislature intended to interfere with the right of one to engage in a common and useful occupation for which he is qualified unless it appears by unequivocal language in the statute itself that such was the intent of the Legislature and then only could such a statute be valid and constitutional if it be a reasonable exercise of the police power.

9. The state act clearly demonstrates the intent on the part of its lawmakers that no one shall practice dentistry as therein defined who is not a licensed registered dentist according to a certificate issued by the Board as evidence of such qualifications. The adequate protection of the public health required no more than that, and beyond that the Legislature did not go; hence, the federal statute is nonoperative and ineffectual.

15 10. That the federal statute is invalid for the reason that it becomes operative only upon the will of state legislatures

thus enabling the several states indirectly to regulate interstate commerce.

11. That the United States District Court for Delaware is without jurisdiction to hear and determine this case.

12. That the United States District Court for Delaware is without jurisdiction to hear and determine this case under count one of the information for the reason that said count does not allege an offense tryable in this district because it fails to show a delivery of the package within this district as an essential element of the offense under which circumstances alone this Court could acquire jurisdiction.

13. Upon information and belief, your petitioners aver that the United States District Court for the District of Delaware is without jurisdiction to hear and determine this case for the reason that none of the defendants has ever at any time been in this district and further because all of the counts of the information allege an offense which if it was committed at all, was committed and wholly completed in the City of Chicago, District of Illinois, since the federal statute under which the information is framed does not make the delivery of the package an essential element of the use of the mails referred to therein.

14. That this court is without jurisdiction to hear and
16 determine this case since the offense was completed in *in* Chicago, Illinois, there being no special venue provisions in the statute under consideration giving the courts of any other district jurisdiction. Jurisdiction cannot be conferred upon this Court merely by alleging a delivery into the State of Delaware for the reason that the act of congress failed to make delivery an essential element of the offense so as to enable this Court to acquire jurisdiction.

15. More allegations showing a delivery into the State of Delaware cannot widen the scope or extend the meaning of the statute so as to confer jurisdiction upon this Court which plainly under the act under consideration it does not now have.

16. That the United States District Court for the District of Delaware is without jurisdiction for the reasons assigned in the previous paragraphs, namely: paragraphs 11, 12, 13, 14, and 15, and for it to assume jurisdiction would be in violation of the constitutional rights as guaranteed them by the Bill of Rights, Article I, Section 7 of the Constitution of the State of Delaware and of the Sixth Amendment of the Constitution of the United States.

Wherefore, for every and all of the foregoing reasons, the defendants respectively pray that the Court quash, set aside and abate the information filed against them herein and that the United

States of America take no further cognizance of or further prosecute for the matter set forth in the information filed herein and that they be permitted to go hence without delay.

(S) H. ALBERT YOUNG,
(S) ALEXANDER JAMISON,
Attorneys for Defendants, Margaret M. Johnson and Mary E. Layton, doing business as the United States Dental Company, and Voyle Clark Johnson.

17 [*Duly sworn to by H. Albert Young and Alexander Jamison; jurat omitted in printing.*]

18 In United States District Court

Order quashing information

Filed Feb. 2, 1944

And now to wit this 2nd day of February A. D. 1944, the above-entitled cause having come on to be heard on February 2, 1943, at 2:00 P. M., upon the Motions to Quash and the Demurrers filed by the Defendants to the Criminal Information filed by the United States charging the Defendants with having violated the Act of December 24, 1942 (Title 18, U. S. C. A., Section 420f), and the United States Attorney and Counsel for the Defendants having been fully heard on oral argument, and the Court having maturely considered the Motions and Demurrers and concluded that the questions presented thereby are the same as presented and passed upon by the Court in Criminal Action No. 296 in which the Court filed its Opinion on January 26, 1944, finding that under the Statute upon which the Information is based prosecution may only be had in the District in which the prohibited matter is deposited in the United States Mails and that the offenses charged in the Criminal Information was completed in Chicago, Illinois in which city the prohibited matter was deposited in the United States Mails and in which Opinion the Court ruled that there are no special provisions in the Statute giving the Court of any other District than that in which the prohibited matter is deposited in the Mails, jurisdiction to prosecute violations of the cited Statute, now on Motion of Counsel for the Defendants and for the reasons expressed by the Court in its Opinion in Criminal Action No. 296, it is

Ordered and adjudged by the Court that the Motions to
19 Quash the Information and Demurrers filed to the Informa-

tion on behalf of the Defendants be and they are hereby granted and sustained and the Information quashed.

(S) PAUL LEAHY,
United States District Judge.

20 In the District Court of the United States for the District of Delaware

Criminal Action No. 296

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON, DEFENDANTS

Stewart Lynch, U. S. atty., of Wilmington, Delaware, for the United States.

H. Albert Young and Alexander Jamison, both of Wilmington, Delaware, for defendants.

Opinion

Filed Jan. 26, 1944

(S) LEAHY.

LEAHY, District Judge.

This matter is here on motions to quash and demurrers to an information charging defendants with violation of an Act of Congress, 56 Stat. 1087, approved December 24, 1942 (Title 18 U. S. C. A. § 420f). The pertinent provisions of the Act provide: "That it shall be unlawful, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails * * * to use the mails * * * for the purpose of sending or bringing into any State or Territory the laws of which prohibit—* * *

"(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of such State or Territory to practice dentistry; or,

"(3) the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such State or Territory to practice dentistry, any denture con-

21 structed from any cast or impressions made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the State or Territory into

which such denture is sent or brought to practice dentistry." The Act contains definitions and penalties.

The information alleges violation of the statute in that on August 25, 1943, defendants, while engaged in the course of conducting a business of constructing or supplying dentures from casts or impressions to be sent through the mails or in interstate commerce, "did use the United States mails for the purpose of sending a set of dentures from the State of Illinois into the State of Delaware, * * *." However, it is essential to note that there is no allegation that the dentures were, in fact, received or delivered in the State of Delaware.

The information then allegs that the laws of Delaware "prohibit the taking of impressions or casts of the human mouth by a person not licensed under the [Delaware] laws to practice dentistry and likewise prohibits the construction or supply of dentures by a person other than and without the authorization or prescription of a person licensed under the [Delaware] laws * * *. to practice dentistry and also prohibits the construction or supply of dentures from impressions or casts made by a person not licensed under the [Delaware] laws * * * to practice dentistry * * *." The information continues by charging that the dentures mailed by the defendants in Illinois to be sent into Delaware were not "constructed by or under the authorization of or pursuant to a prescription of a person licensed under the laws of the State of Delaware to practice dentistry * * *." This is the initial appearance of the federal statute before a federal court.

Defendants attack the information on several grounds: (1) the court of this district does not have jurisdiction; (2) the form of the Delaware statutes is such that they are not integrated or covered by the federal provisions; and (3) if they are covered the state and federal statutes are unconstitutional. I shall discuss
22 merely the question of jurisdiction for my holding in regard to it will be dispositive of the matter now before me.

Defendants contend that unlawful use of the mails under this statute can be prosecuted only in the district in which the prohibited matter was deposited in the mails. I think this position sound. The significant words of the statute are "to use the mails * * * for the purpose of sending or bringing into any State * * *." That which the statute condemns, therefore, is the use of the mails for the purpose of sending or bringing prohibited matter into the State. It is well established—with minor exceptions, none of which apply here—that for most crimes an act and intent are essential. The crime defined in that statute sub judice requires these elements. Obviously, both of these operative facts occurred in Chicago—the place where the package was mailed with the purpose of sending or bringing it into Delaware.

In short, there was a completed criminal offense at the moment of mailing because use plus purpose of sending or bringing into any State is what the statute prohibits. It is not an essential prerequisite to a valid conviction that the purpose or intent be, in fact, effectuated. Since the crime was complete at the place of sending, with the purpose mentioned, the government's contention bottomed on Section 42 of the Judicial Code[1] (28 U. S. C. A. § 103) and cases decided under it is wide of the mark. The typical cases under Section 42 are those involving, for the most part, the crime of conspiracy. A conspirator may be prosecuted either where the conspiracy is formed or where the overt act is committed. Grigg v. Bolton, 9 cir., 53 F. 2d 158; United States v. Jordan, D. C., 22 F. 2d 702. In such situations the statute, in order to prevent a failure of justice, has made the offense
23 punishable in either district as if it had been wholly committed therein. The statute was required to take this form in order to conform to the Sixth Amendment to the Constitution which guarantees to an accused the right to jury trial in "the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." It is necessary to distinguish carefully situations where an offense was committed in both districts or where it was completed in the second district. See in re Pallister, 136 U. S. 257; United States v. Freeman, 239 U. S. 117. Manifestly, such cases are inappropriate here where the offense was completed at the district of mailing, and where the statute invoked does not create an offense in a second or other district.

The meaning of the language of the statute is plain; and in the absence of a special venue provision the alleged offense must be prosecuted in the district where the crime was actually and wholly committed. It is true, of course, that if Congress intended to use the words of the statute in other than their ordinary meaning, the court will accept the Congressional dictionary meaning of the words. This is in accord with Boston Sand Co. v. United States, 278 U. S. 41. There the Supreme Court said: "* * * when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to

[1] The statute provides that "When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein." In this case, the offense was actually and wholly committed in Chicago, Illinois, so this statute is manifestly inapplicable.

consider that fact when we come to interpret a statute." With respect to the present statute, however, there is, indeed, much persuasive evidence that Congress intended the words of the statute to have their ordinary meaning. Legislative history
24 supports the conclusion reached here. The Postmaster General, for example, expressed the opinion [2] that the statute does not provide for prosecution of violators in the jurisdiction where the material is caused to be delivered. H. R. 5674, 77th Cong., 1st sess., is referred to in the Congressional Record as of September 17, 1941. It contains the statute which was before the Postmaster General and which he suggested should be rewritten so as to contain a venue provision. Three months later, when the Subcommittee of the House commenced its hearings on February 3, 1942, the statute in the form in which it appears in H. R. 5674 and in its present form as enacted, was introduced before the Subcommittee, together with the recommendation of the Postmaster General. See Hearing of Subcommittee on H. R. 5674, pp. 1–3. Likewise, the Subcommittee of the Senate commenced its hearings on July 15, 1942, and it had the identical statute before it. See Hearings before Subcommittee on S. 2371, p. 1–2. A diligent reading of the reports of the hearings before both branches of Congress fails to disclose that the Postmaster General's suggestion was either considered or acted upon. This is significant, for I do not think that Congress should be presumed to have intended that the statute should have a meaning at war with the interpretation of the governmental department charged with its
25 administration. This precludes, I think, a holding that Congress used the words of the statute in other than their plain and ordinary meaning.

Moreover, if Congress had intended that violators could be prosecuted in the district in which the articles were delivered it could easily have said so as it had done in several prior instances. Sec. 20 (b) (15 U. S. C. A. § 77 (b)) of the Securities and Exchange Act, for example, in dealing with transmission of a prospectus

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[2] See following footnote:

OFFICE OF THE POSTMASTER GENERAL,
Washington, D. C., November 5, 1941.

Hon. CLARENCE F. LEA,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives,

MY DEAR MR. LEA: Your letter of September 18, 1941, requested a report upon H. R. 5674, a bill to protect the public health by the prevention of certain practices leading to dental disorders; and to prevent the circumvention of certain State laws regulating the practice of dentistry.

This Department has no objection to the enactment of this proposed legislation. *However, it is believed that consideration should be given to the advisability of having the measure provide for prosecution of violators in the jurisdiction where the material is caused to be delivered as well as in the jurisdiction from which it is sent.*

It has been ascertained from the Bureau of the Budget that this report is in accord with the program of the President.

Very truly yours,

FRANK C. WALKER,
Postmaster General.

or a security provides that: "Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received." I shall not pause to discuss the fundamental rule of strict construction of criminal statutes as an additional support to defendants' contention. See Prussion v. U. S., 282 U. S. 675; U. S. v. Resnick, 299 U. S. 207.

Finally, the government in drafting the present information adopted what defendants argue is the correct interpretation of the statute. The information charges that defendants "did use the United States mails for the purpose of sending a set of dentures from the State of Illinois into the State of Delaware * * *." There is no allegation that the dentures were actually received or delivered in the State of Delaware. It may fairly be said, therefore, that the information accepts the correctness of defendants' contention, for if the government were right in its interpretation it would have alleged that the dentures were received or delivered within this district. This it has failed to do. The internal evidence indicates, then, that the draftsman of the information subconsciously interpreted the statute as I have.

Since the offenses were completed in Chicago, Illinois, and since there are no special venue provisions in the statute giving the courts of any other district jurisdiction, I hold that the defendants' motions should be granted and the demurrers sustained. Since this ruling is dispositive of the present matter, I shall not consider any of the other interesting Constitutional questions raised by defendants.

Dated January 25, 1944.

26 In United States District Court

Petition for appeal

Filed March 3, 1944

Comes now the United States of America, plaintiff herein, and states that on the 2nd day of February 1944, the District Court of the United States for the District of Delaware entered a judgment and order sustaining motions to quash and demurrers to the information herein, and quashing the said information, and that the United States of America, feeling aggrieved at the ruling of the District Court sustaining the said motions and demurrers and quashing the said information, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record

in this cause, duly authenticated, may be sent to the Supreme Court of the United State

Petitioner submits and presents to the court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

UNITED STATES OF AMERICA.
(S) STEWART LYNCH,
United States Attorney,
District of Delaware.

41 In United States District Court

Assignment of errors

Filed March 3, 1944

Comes now the United States of America, by Stewart Lynch, United States Attorney for the District of Delaware, and avers that in the record proceedings and judgment and order herein there is manifest error and against the just rights of the said plaintiff, the United States of America, in this, to wit:

1. That the court erred in sustaining the demurrers to the information.

2. That the court erred in sustaining the motions to quash the information.

3. That the court erred in quashing the information.

4. That the court erred in holding that a violation, by the use of the United States mails, of the so-called Denture Act (Act of December 24, 1942, c. 823, 56 Stat. 1087; 18 U. S. C. 420f) can occur only in the federal district in which the proscribed matter is deposited in the mails.

5. That the court erred in holding that a violation of the act is not committed in the federal district into which proscribed matter is delivered where it has been deposited in the mails in another federal district.

6. That the court erred in holding that a violation of the act, by the use of the mails, may be prosecuted only in the
42 federal district in which the proscribed matter is deposited in the mails.

7. That the court erred in holding that a violation of the act, by the use of the mails, may not be prosecuted in the federal district into which the proscribed matter is delivered, or into which

it is directed for delivery, where it has been deposited in the mails in another federal district.

(S) STEWART LYNCH,
United States Attorney,
District of Delaware.

43 In United States District Court

Order allowing appeal to the Supreme Court of the United States

Filed March 3, 1944

This cause having come on this day before the Court on petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for reversal of the judgment and order in the cause sustaining the defendants' motions to quash and demurrers to the information therein and quashing the said information, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said petition, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of the Court, it is, therefore, by the Court ordered and adjudged, that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this Court sustaining the defendants' motions to quash and demurrers to the information and quashing the said information, to the Supreme Court of the United States, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court.

44 It is further ordered, that the United States of America be, and it is hereby, permitted a period of forty days in which to file and docket the said appeal in the Supreme Court of the United States.

Dated at Wilmington, Delaware, this 3rd day of March 1944.

By the Court:

(S) PAUL LEAHY,
United States District Judge,
District of Delaware.

46 [Citation in usual form showing service on H. Albert Young and Alex Jamison, filed March 3, 1944, omitted in printing.]

47 In United States District Court

Praecipe for transcript of record

Filed March 3, 1944

To the Clerk, District Court of the United States for the District of Delaware:

The appellant, the United States of America, hereby directs that in preparing the transcript of the record in this cause in the District Court of the United States for the District of Delaware, you include the following:

1. Docket entries and minute entries showing filing of the information, filing of motions to quash and demurrers thereto, entry of order sustaining motions to quash and demurrers to the information and quashing the same, and filing of memorandum opinion of Judge Leahy, dated January 26, 1944, rendered on motions to quash and demurrers to the information in Criminal Action No. 296.
2. Information.
3. Demurrers and motions to quash the information.
4. Order sustaining demurrers and motions to quash the information, and quashing the same.
5. Memorandum opinion of Judge Leahy, dated January 26, 1944, rendered on motions to quash and demurrers to the information in Criminal Action No. 296.

48 6. Petition for appeal to the Supreme Court.
7. Statement as to the jurisdiction of the Supreme Court.
8. Assignment of errors.
9. Order allowing appeal.
10. Notice of service on appellees of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
11. Citation.
12. Praecipe.

(S) STEWART LYNCH.
United States Attorney,
District of Delaware.

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 3rd day of March 1944.

(S) H. ALBERT YOUNG.
(S) ALEX JAMISON.
Counsel for Appellees.

49 [Clerk's certificate to foregoing transcript omitted in printing.]

50 In the Supreme Court of the United States

Statement of points to be relied on and designation of record

Filed March 30, 1944

Pursuant to Rule XIII, paragraph 9 of this Court, appellant states that it intends to rely upon all of the points in its assignments of error.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

CHARLES FAHY,
Solicitor General.

Service of the above Statement of Points and Designation of Record acknowledged this 28th day of March 1944.

H. ALBERT YOUNG,
ALEXANDER JAMISON,
Counsel for Appellees.

[File endorsement omitted.]

51 Supreme Court of the United States

Order noting probable jurisdiction

April 10, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

[Endorsement on cover:] File No. 48304. Delaware, D. C. U. S. Term No. 811. The United States of America, Appellant vs. Margaret M. Johnson and Mary E. Layton, Doing business as the United States Dental Company, and Voyle Clark Johnson. Filed March 23, 1944. Term No. 811 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE 1944

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FILED
MAR 23 1944
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 43

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, APPELLANT

v.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

STATEMENT AS TO JURISDICTION

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 811

THE UNITED STATES OF AMERICA, APPELLANT

v.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

STATEMENT AS TO JURISDICTION UNDER RULE 12 OF THE SUPREME COURT OF THE UNITED STATES

(Filed March 3, 1944)

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and order of the District Court entered in this cause on February 2, 1944,

580057—44——1

sustaining motions to quash and demurrers to the information therein and quashing the said information. Petition for appeal was filed on March 3, 1944, and is presented to the District Court herewith, to wit, on March 3, 1944.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 State. 1246 (as amended by the Act of May 9, 1942, 56 Stat. 401), 18 U. S. C. 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

The so-called Denture Act (Act of December 24, 1942, c. 823, 56 Stat. 1087; 18 U. S. C. 420f, 420g, 420h) provides as follows:

> § 420f. Unlawful transportation of dentures made in derogation of State or Territorial laws regulating the practice of dentistry.
>
> It shall be unlawful, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in interstate commerce, to use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory the laws of which prohibit—

(1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under the laws of such State or Territory to practice dentistry;

(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of such State or Territory to practice dentistry; or,

(3) the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such State or Territory to practice dentistry,

any denture constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the State or Territory into which such denture is sent or brought to practice dentistry.

§ 420g. Same; definitions.

As used in section 420f of this title, the term—

(1) "Denture" means a set of artificial teeth, or any prosthetic dental appliance;

(2) "Territory" means any Territory or possession of the United States, including the District of Columbia and the Canal Zone.

(3) "Interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

§ 420h. Same; penalties.

Any violation of any provision of sections 420f–420h of this title shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Section 42 of the Judicial Code (28 U. S. C. 103) provides:

When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired, of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

THE ISSUE AND THE RULING BELOW

On October 4, 1943, the United States Attorney for the District of Delaware filed a one-count information, in the District Court of the United States for the District of Delaware, charging the defendants with having, in the course of a business of supplying dentures from casts or impressions sent through the United States mails, placed in such mails at Chicago, Illinois, for delivery to one Alice Harris at Houston, Delaware, a set of dentures not made by, or from a cast made by or upon the authorization of, a person licensed by the laws of Delaware to practice dentistry—such use of the mails being alleged to be in violation of the Federal Denture Act. Pur-

suant to a memorandum dated January 26, 1944, appended hereto, the District Court on February 1, 1944, entered an order sustaining defendants' motions to quash and demurrers to the said information, and quashing the same. The Court's conclusion was based in part on the failure of the information to allege that the dentures were actually delivered into Delaware. Accordingly, on January 26, 1944, the United States Attorney filed another information, in three counts, the second and third of which alleged that the parcel containing the dentures, "so mailed as aforesaid, was then transmitted in due course by the Post Office Establishment of the United States to and into the State of Delaware, to-wit, at Houston, Delaware, and within the Jurisdiction of this Court." On February 2, 1944, the District Court, in reliance on its memorandum of January 26, 1944, entered an order sustaining defendants' motions to quash and demurrers to the second information, and quashing the same. It is this order that the United States seeks to appeal.

The District Court ruled that, even though the dentures were delivered into Delaware, the offense was nevertheless completed at Chicago, Illinois, where they were placed in the mails, and that therefore it could not be prosecuted in the District Court for the District of Delaware.

The Denture Act contains no express venue provision, and the question turns on the con-

struction to be given the words "to use the mails or any instrumentality of interstate commerce" in determining where an offense is committed. *United States* v. *Freeman*, 239 U. S. 117, was a direct appeal under the Criminal Appeals Act on a similar question arising under the Webb-Kenyon Act, and is authority for the jurisdiction of the Supreme Court to review the present decision.

THE QUESTION IS SUBSTANTIAL

As the District Court points out, this is the initial appearance of the Federal Denture Act in the courts. The same as the Webb-Kenyon Act, the Denture Act places shipments into a state from a foreign country[1] and shipments from another state "upon the same plane and makes them equally criminal". (*United States* v. *Freeman*, 239 U. S. at 120); and as the Supreme Court further pointed out in the case cited, "Whatever marks the completion of the offense in one likewise marks it in the other. If it be the delivery to the carrier in the case of interstate shipments it equally is this delivery in the case of shipments from a foreign country. And yet all will concede that Congress did not intend to do anything so obviously futile as to denounce as criminal an act wholly done in a foreign country, such as is the delivery to the carrier where

[1] It does this by defining "interstate commerce" as "commerce between any State or Territory and any place outside thereof."

the shipment is from a foreign country into a state. So, if its words permit, as we think they do, the statute must be given a construction which will cause it to reach both classes of shipments, and thereby to accomplish the purpose of its enactment." In the present case "use" of the mails cannot have a narrower meaning than "use" of the facilities of interstate commerce; consequently the effect of the District Court's decision is to deprive the Denture Act of any application to shipments into a State from a foreign country, although Congress has expressly made it applicable to such shipments. Such an incongruous result would present a substantial question even in the absence of prior judicial authority supporting the Government's position.

Support from prior judicial authority is not, however, lacking. In *In re Palliser*, 136 U. S. 257, 267, the Supreme Court pointed out that "the offence charged being an offer of money, or a tender of a contract for the payment of money, contained in a letter mailed in New York and addressed to a postmaster in Connecticut, to induce him to violate his official duty, it might admit of doubt whether any offence against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. *But there can be no doubt at all that, if any offence was committed in New York, the offence continued to be com-*

*mitted when the letter reached the postmaster in Connecticut; * * *"* [italics supplied]. As stated in *Benson* v. *Henkel,* 198 U. S. 1, 15, the case was "treated as covered by" Section 42 of the Judicial Code (28 U. S. C. 103). In concluding that the Government's contention based upon this provision (set forth *supra,* p. 2) is inapplicable here for the reason that enough facts to constitute the crime occurred in Illinois, the District Court, we believe, overlooked the fact, recognized in the *Palliser* opinion, that an offense already committed in one jurisdiction may "continue to be committed" in another. This is necessarily so of any continuing crime which is but one crime although separate parts thereof are severally sufficient to found an indictment or information. That is the situation here. Although but a single offense was committed by the use of the mails for the shipment of a parcel of dentures, it was a continuing one, and any part of such use of the mails was sufficient.[2] We therefore believe that Section 42 of the Judicial Code is not limited to the type of situation where the crime has not been committed until the shipment has reached the state of destination. It follows that it is applicable here, if the words "to use the mails or

[2] Should prosecutions against the same defendant be instituted in both the state of mailing or shipment and the state of delivery, the Government, of course, could be required to elect as to which case it desired to prosecute. *Salinger* v. *Loisel,* 265 U. S. 224, 234.

any instrumentality of interstate commerce" are to be given their normal connotation of any transportation by such means as distinguished from mere "deposit" therein. Had Congress meant the latter it would have used the word "deposit." Cf. *United States* v. *Freeman*, 239 U. S. 117, 120: "To reach a different result the word 'ship' must be read as if it were 'deliver for shipment.'"

The question presented is thus substantial and of large public importance, in view of the fact that the case is one of first impression under the Denture Act, of the fact that the decision of the District Court deprives this Act of its intended application to shipments from foreign countries and thrusts upon United States Attorneys in states of origin the burden of informing themselves and enforcing the policy of the laws of the states of destination, and of the fact that the words of the statute and judicial precedents sustain the construction urged by the Government.

Appended hereto is a copy of the order of the District Court entered on February 2, 1944, and a copy of its prior memorandum of January 26, 1944, in accordance with which the order of February 2, 1944, was entered.

Respectfully submitted.

(S) STEWART LYNCH,
United States Attorney,
District of Delaware.

580057—44——2

Charles Fahy,

ORDER

(Filed Feb. 2, 1944)

And now to-wit this 2nd day of February A. D., 1944, the above entitled cause having come on to be heard on February 2, 1943 [1944] at 2:00 P. M., upon the Motions to Quash and the Demurrers filed by the Defendants to the Criminal Information filed by the United States charging the Defendants with having violated the Act of December 24, 1942 (Title 18, U. S. C. A., Section 420f), and the United States Attorney and Counsel for the Defendants having been fully heard on oral argument, and the Court having maturely considered the Motions and Demurrers and concluded that the questions presented thereby are the same as presented and passed upon by the Court in Criminal Action No. 296 in which the Court filed its Opinion on January 26, 1944, finding that under the Statute upon which the Information is based prosecution may only be had in the District in which the prohibited matter is deposited in the United States Mails and that the offenses charged in the Criminal Information was completed in Chicago, Illinois, in which city the prohibited matter was deposited in the United States Mails and in which Opinion the Court ruled that there are no special provisions in the Statute giving the Courts any other District than that in which the prohibited matter is deposited in the Mails, jurisdiction to prosecute

violations of the cited Statute, now on Motion of Counsel for the Defendants and for the reasons expressed by the Court in its Opinion in Criminal Action No. 296, it is

Ordered and adjudged by the Court that the Motions to Quash the Information and Demurrers filed to the Information on behalf of the Defendants be and they are hereby granted and sustained and the Information quashed.

(S) PAUL LEAHY,
United States District Judge.

A true copy.
Attest:

EDWARD G. POLLARD,
Clerk.

By (S) T. M. BEAUCHAMP,
Deputy Clerk.

In the District Court of the United States for the District of Delaware

Criminal Action No. 296

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON, DEFENDANTS

(Filed Jan. 26, 1944)

Stewart Lynch, U. S. atty., of Wilmington, Delaware, for the United States.

H. Albert Young and Alexander Jamison, both of Wilmington, Delaware, for defendants.

(S) LEAHY,
Leahy,
District Judge.

This matter is here on motions to quash and demurrers to an information charging defendants with violation of an Act of Congress, 56 Stat. 1087, approved December 24, 1942 (Title 18 U. S. C. A. § 420f). The pertinent provisions of the Act provide: "That it shall be unlawful, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent

through the mails * * * to use the mails * * * for the purpose of sending or bringing into any State or Territory the laws of which prohibit— * * *

"(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of such State or Territory to practice dentistry; or,

"(3) the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such State or Territory to practice dentistry, any denture constructed from any cast or impressions made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the State or Territory into which such denture is sent or brought to practice dentistry." The Act contains definitions and penalties.

The information alleges violation of the statute in that on August 25, 1943, defendants, while engaged in the course of conducting a business of constructing or supplying dentures from casts or impressions to be sent through the mails or in interstate commerce, "did use the United States mails for the purpose of sending a set of dentures from the State of Illinois into the State of Delaware, * * *." However, it is essential to note that there is no allegation that the dentures were, in fact, received or delivered in the State of Delaware.

The information then alleges that the laws of Delaware "prohibit the taking of impressions or casts of the human mouth by a person not licensed under the [Delaware] laws to practice dentistry and likewise prohibits the construction or supply of dentures by a person other than and without the authorization or prescription of a person licensed under the [Delaware] laws * * * to practice dentistry and also prohibits the construction or supply of dentures from impressions or casts made by a person not licensed under the [Delaware] laws * * * to practice dentistry * * *." The information continues by charging that the dentures mailed by the defendants in Illinois to be sent into Delaware were not "constructed by or under the authorization of, or pursuant to a prescription of a person licensed under the laws of the State of Delaware to practice dentistry * * *." This is the initial appearance of the federal statute before a federal court.

Defendants attack the information on several grounds: (1) the court of this district does not have jurisdiction; (2) the form of the Delaware statutes is such that they are not integrated or covered by the federal provisions; and (3) if they are covered the state and federal statutes are unconstitutional. I shall discuss merely the question

of jurisdiction, for my holding in regard to it will be dispositive of the matter now before me.

Defendants contend that unlawful use of the mails under this statute can be prosecuted only in the district in which the prohibited matter was deposited in the mails. I think this position sound. The significant words of the statute are "to use the mails * * * for the purpose of sending or bringing into any State * * *." That which the statute condemns therefore, is the use of the mails for the purpose of sending or bringing prohibited matter into the State. It is well established—with minor exceptions, none of which apply here—that for most crimes an act and intent are essential. The crime defined in that statute sub judice requires these elements. Obviously, both of these operative facts occurred in Chicago—the place where the package was mailed with the *purpose* of sending or bringing it into Delaware.

In short, there was a completed criminal offense at the moment of mailing because use plus purpose of sending or bringing into any State is what the statute prohibits. It is not an essential prerequisite to a valid conviction that the purpose or intent be, in fact, effectuated. Since the crime was complete at the place of sending, with the purpose mentioned, the government's contention

bottomed on Section 42 of the Judicial Code[1] (28 U. S. C. A. § 103) and cases decided under it is wide of the mark. The typical cases under Section 42 are those involving, for the most part, the crime of conspiracy. A conspirator may be prosecuted either where the conspiracy is formed or where the overt act is committed. *Grigg* v. *Bolton*, 9 cir., 53 F. 2d 158; *United States* v. *Jordan, D. C.*, 22 F. 2d 702. In such situations the statute, in order to prevent a failure of justice, has made the offense punishable in either district as if it had been wholly committed therein. The statute was required to take this form in order to conform to the Sixth Amendment to the Constitution which guarantees to an accused the right to jury trial in "the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." It is necessary to distinguish carefully situations where an offense was committed in both districts or where it was completed in the second district. See *in re Pallister*, 136 U. S. 257; *United States* v. *Freeman*, 239

[1] The statute provides that "When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein." In this case, the offense was actually and wholly committed in Chicago, Illinois, so this statute is manifestly inapplicable.

U. S. 117. Manifestly, such cases are inappropriate here where the offense was completed at the district of mailing, and where the statute invoked does not create an offense in a second or other district.

The meaning of the language of the statute is plain; and in the absence of a special venue provision the alleged offense must be prosecuted in the district where the crime was actually and wholly committed. It is true, of course, that if Congress intended to use the words of the statute in other than their ordinary meaning, the court will accept the Congressional dictionary meaning of the words. This is in accord with *Boston Sand Co.* v. *United States*, 278 U. S. 41. There the Supreme Court said: "* * * when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute." With respect to the present statute, however, there is, indeed, much persuasive evidence that Congress intended the words of the statute to have their ordinary meaning. Legislative history supports the conclusion reached here. The Postmaster Gen-

eral, for example, expressed the opinion [2] that the statute does not provide for prosecution of violators in the jurisdiction where the material is caused to be delivered. H. R. 5674, 77th Cong., 1st sess., is referred to in the Congressional Record as of September 17, 1941. It contains the statute which was before the Postmaster General and which he suggested should be rewritten so as to contain a venue provision. Three months later, when the Subcommittee of the House commenced its hearings on February 3, 1942, the statute in

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[2] "OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, D. C., *November 5, 1941.*

"Hon. CLARENCE F. LEA,
Chairman, Committee on Interstate and
Foreign Commerce,
House of Representatives.

"MY DEAR MR. LEA:

"Your letter of September 18, 1941, requested a report upon H. R. 5674, a bill to protect the public health by the prevention of certain practices leading to dental disorders; and to prevent the circumvention of certain State laws regulating the practice of dentistry.

"This Department has no objection to the enactment of this proposed legislation. *However, it is believed that consideration should be given to the advisability of having the measure provide for prosecution of violators in the jurisdiction where the material is caused to be delivered as well as in the jurisdiction from which it is sent.*

"It has been ascertained from the Bureau of the Budget that this report is in accord with the program of the President.

Very truly yours,

FRANK C. WALKER,
Postmaster General."

the form in which it appears in H. R. 5674 and in its present form as enacted, was introduced before the Subcommittee, together with the recommendation of the Postmaster General. See Hearing of Subcommittee on H. R. 5674, pp. 1–3. Likewise, the Subcommittee of the Senate commenced its hearings on July 15, 1942, and it had the identical statute before it. See Hearings before Subcommittee on S. 2371, p. 1–2. A diligent reading of the reports of the hearings before both branches of Congress fails to disclose that the Postmaster General's suggestion was either considered or acted upon. This is significant, for I do not think that Congress should be presumed to have intended that the statute should have a meaning at war with the interpretation of the governmental department charged with its administration. This precludes, I think, a holding that Congress used the words of the statute in other than their plain and ordinary meaning.

Moreover, if Congress had intended that violators could be prosecuted in the district in which the articles were delivered it could easily have said so as it had done in several prior instances. Sec. 20 (b) (15 U. S. C. A. § 77 (b)) of the Securities and Exchange Act, for example, in dealing with transmission of a prospectus or a security provides that: "Any such criminal proceeding may be brought either in the district wherein the

transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received." I shall not pause to discuss the fundamental rule of strict construction of criminal statutes as an additional support to defendants' contention. See *Prussion* v. *U. S.*, 282 U. S. 675; *U. S.* v. *Resnick*, 299 U. S. 207.

Finally, the government in drafting the present information adopted what defendants argue is the correct interpretation of the statute. The information charges that defendants "did use the United States mails for the purpose of sending a set of dentures from the State of Illinois into the State of Delaware * * *." There is no allegation that the dentures were actually received or delivered in the State of Delaware. It may fairly be said, therefore, that the information accepts the correctness of defendants' contention, for if the government were right in its interpretation it would have alleged that the dentures were received or delivered within this district. This it has failed to do. The internal evidence indicates, then, that the draftsman of the information subconsciously interpreted the statute as I have.

Since the offenses were completed in Chicago, Illinois, and since there are no special venue provisions in the statute giving the courts of any other district jurisdiction, I hold that the defendants' motions should be granted and the demurrers sus-

tained. Since this ruling is dispositive of the present matter, I shall not consider any of the other interesting Constitutional questions raised by defendants.

Dated January 25, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

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SEP 8 1944
CHARLES ELMORE CROPLEY
CLERK

No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, APPELLANT

v.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 43

THE UNITED STATES OF AMERICA, APPELLANT

v.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the District Court quashing the information (R. 10–11) is based upon its opinion (R. 11–15), reported at 53 F. Supp. 596, quashing a prior information against the appellees.

JURISDICTION

The jurisdiction of this Court on direct appeal is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, commonly known as the Criminal Appeals Act, as amended by the Act of May 9,

1942, c. 295, 56 Stat. 271 (18 U. S. C., Supp. III, 682), and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U. S. C. 345). The order of the District Court quashing the information was filed on February 2, 1944 (R. 10–11). The appeal to this Court was applied for (R. 15–16) and allowed (R. 17) on March 3, 1944. Probable jurisdiction was noted by this Court on April 10, 1944, and the case transferred to the summary docket (R. 19).

QUESTION PRESENTED

Whether a prosecution for a violation of the Federal Denture Act by using the mails may not be brought in the district in which the denture is delivered through the mails but only in the district in which the denture is deposited in the mails.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Federal Denture Act, "An Act to protect the public health by the prevention of certain practices leading to dental disorders; and to prevent the circumvention of certain State or Territorial laws regulating the practice of dentistry," approved December 24, 1942, c. 823, 56 Stat. 1087; 18 U. S. C., Sup. III, 420f, 420g, and 420h; provides:

> SEC. 1. That it shall be unlawful, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in

interstate commerce, to use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory the laws of which prohibit—

(1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under the laws of such State or Territory to practice dentistry;

(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of such State or Territory to practice dentistry; or

(3) the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such State or Territory to practice dentistry—

any denture constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the States or Territory into which such denture is sent or brought to practice dentistry.

SEC. 2. As used in the Act, the term—

(1) "Denture" means a set of artificial teeth, or any prosthetic dental appliance;

(2) "Territory" means any Territory or possession of the United States, including the District of Columbia and the Canal Zone.

(3) "Interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

SEC. 3. Any violation of any provision of this Act shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.[1]

Article III, Section 2, Clause 3, of the Constitution, provides:

> The Trial of all Crimes * * * shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; * * *.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

Section 42 of the Judicial Code (28 U. S. C. 103) provides:

> When any offense against the United States is begun in one judicial district and

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[1] Unlike some of the federal criminal statutes (see list in Note to Rule 20 of the *Proposed Federal Rules of Criminal Procedure*, Second Preliminary Draft, pp. 101-104), the Denture Act contains no specific provision regulating the venue for prosecutions thereunder.

completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

STATEMENT

On October 4, 1943, there was filed in the District Court of the United States for the District of Delaware a single-count information which charged appellees, in the course of the conduct of a business of supplying dentures from casts or impressions sent through the mails, with having used the mails for the purpose of sending a set of dentures, not constructed in accordance with the requirements of the Federal Denture Act, from Illinois into Delaware, the laws of which latter state prohibit certain practices, recited in the Act, in connection with the construction of dentures. The use of the mails was alleged to have consisted of the depositing by appellees of the set of dentures in the mails at Chicago for delivery to one Alice Harris at Houston, Delaware. Pursuant to an opinion filed January 26, 1944 (R. 11–15), the District Court on February 1, 1944, entered an order which sustained appellees' motions to quash and demurrers and quashed the information. The decision was based upon the ground that the prosecution could lie only in the Northern District of Illinois, but the opinion, in passing, stated that the information failed to

allege that the dentures were, in fact, received or delivered in Delaware (R. 12, 15). On January 26, 1944, the day the opinion was rendered, the United States Attorney filed another information, in three counts (R. 2–5), to which appellees likewise filed a demurrer and motion to quash (R. 6–10). The first count of the second information is a duplicate of the allegations of the prior information (R. 2–3); the second count contains an additional allegation that "the set of dentures * * * so mailed as aforesaid was then transmitted in due course by the Post Office Establishment of the United States to and into the State of Delaware, to wit, to and at Houston, Delaware" (R. 4); the third count alleges, further, delivery of the dentures to Alice Harris at Houston, Delaware (R. 5). The first two counts allege that the mails were used for the purpose of "sending" the set of dentures into Delaware; the third count alleges that the mails were used for the purpose of "bringing" the set of dentures into Delaware. On February 2, 1944, the District Court, relying upon its opinion of January 26, 1944, entered an order sustaining appellees' motion to quash and demurrer to the second information and quashing the same (R. 10–11). The appeal by the United States is from this order.

The District Court ruled that even though the dentures were alleged to have been delivered

through the mails in the district of Delaware,[2] no offense was committed in that district since criminality under the statute was exhausted at the moment the dentures were mailed at Chicago with the forbidden purpose of sending or bringing them into Delaware (R. 10, 11–15). After pointing out that the significant words of the statute are "to use the mails * * * for the purpose of sending or bringing into any State * * *," the court reasoned that this language fitted in with the pattern for most crimes of an act and intent; that both of these "operative facts" occurred in Chicago; and, hence, that there was a completed criminal offense at the moment of mailing in Chicago. The court stated that "use plus purpose of sending or bringing into any State is what the statute prohibits," and that "It is not an essential prerequisite to a valid conviction that the purpose or intent be,

[2] It is open to doubt whether, in the face of attack by demurrer and motion to quash (par. 12, R. 9), the first count sufficiently alleges a delivery in Delaware. (See *Hagner* v. *United States*, 285 U. S. 427.) The second and third counts of the information, however, in specific terms, charge a delivery in Delaware. The decision of the District Court as to all of the counts was predicated solely upon the lack of power of the Government to prosecute in Delaware. In the event of a reversal, the sufficiency of the first count to allege delivery in Delaware can be determined on remand along with other questions raised by the demurrer and motion to quash as to the construction and constitutionality of the Federal Denture Act and the auxiliary Delaware dental statutes (R. 6–9) which were not decided by the District Court (R. 10, 12, 13).

in fact, effectuated" (R. 12–13). The court also held that the Government could not rely on Section 42 of the Judicial Code (*supra*, pp. 4–5) and the cases thereunder, since the crime was complete at Chicago (R. 13). The court found support for its construction in the failure of Congress to act in response to a suggestion by the Postmaster General, in stating his Department's position with reference to the proposed legislation, that "consideration should be given to the advisability of having the measure provide for prosecution of violators in the jurisdiction where the material is caused to be delivered as well as in the jurisdiction from which it is sent" (R. 14). Reliance was also placed upon the existence in other criminal legislation, notably the Securities and Exchange Act, of special provision for the prosecution of offenses in the district in which an article is delivered (R. 14–15).

SPECIFICATION OF ERRORS TO BE URGED

The assignment of errors filed in the District Court (R. 16–17) may be thus compressed:

(1) The District Court erred in holding that a violation of the Federal Denture Act, by the use of the mails, can occur and may be prosecuted only in the district in which the proscribed matter is deposited in the mails, and not in the district into which such matter is delivered as directed by the sender.

(2) In sustaining the demurrer and motion to quash and in quashing the information.

SUMMARY OF ARGUMENT

To prevent the circumvention of state dental laws, enacted in the interest of the public health, the Federal Denture Act makes it an offense for dental laboratories carrying on business through the mails or by instrumentality of interstate commerce to "use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory" any denture which could not be supplied intrastate under its laws. Appellees, according to the information, transported a nonconforming denture through the mails from Chicago to Delaware. They were prosecuted in Delaware. The District Court for that District held that they could be prosecuted only in the Northern District of Illinois because a completed offense was committed at Chicago at the moment they, for the forbidden purpose, mailed the denture.

We contend that the Government was not so limited and, at its option, was entitled to prosecute appellees in Delaware.

The statute may not be read as though it penalizes merely the "depositing" of the denture in the mails for a proscribed purpose. The "use" of the mails, or of an instrumentality of interstate commerce, to which the court did not allude, clearly does not terminate until the use to which the offender puts the Post Office Establishment, the railroad, the motor carrier, or the expressman,

is ended. Cf. *United States* v. *Freeman*, 239 U. S. 117. In this case the "use" continued until the denture was delivered in Delaware. Support for this construction is found in language appearing in the Act itself and also in the avowed legislative objective that dentures offensive to the health policies of the states of destination be not transported into those states.

The District Court's interpretation results in incongruities which it can hardly be supposed Congress intended. Although the Act, evidently, applies to a nonmail shipment of a denture from a foreign country, the reasoning of the District Court would exclude such a shipment from the operation of the statute. Also, while the statute is integrated with the laws of the state of destination, the District Court limits venue to the state of origin, thereby thrusting the enforcement role upon prosecuting officials there. Additionally, the Government's principal witness lives in the state of destination.

A. The offense, in our opinion, continues to be committed so long as and wherever the "use" of the mails or an instrumentality of interstate commerce continues for the forbidden purpose, a not unfamiliar concept in federal criminal law. Cf. *In re Palliser*, 136 U. S. 257; *Armour Packing Co.* v. *United States*, 209 U. S. 56. In the absence of any venue provision in the Act, the offense having been committed in Delaware as well as in the Northern District of Illinois, the Government,

under ordinary venue principles, or, perhaps, by the application of Section 42 of the Judicial Code, was entitled to prosecute in Delaware.

B. If certain language in the statute, which we do not think may be so treated, has the effect either of localizing the offense in Delaware or of establishing, within the terminology of Section 42, an offense "begun" in Illinois and "completed" in Delaware, the result is not changed. Under any permissible theory appellees were properly prosecuted in Delaware.

ARGUMENT

APPELLEES WERE PROPERLY PROSECUTED IN DELAWARE UNDER ANY ACCEPTABLE CONSTRUCTION OF THE FEDERAL DENTURE ACT

This case is the initial appearance of the Denture Act in the federal courts (R. 12). As its title indicates, the purposes of the legislation are to "protect the public health by the prevention of certain practices leading to dental disorders; and to prevent the circumvention of certain State or Territorial laws regulating the practice of dentistry." The evils which resulted from the construction and supplying by certain "mail order" dental laboratories of dentures from casts or impressions made by the "patient" himself are depicted in letters from the Administrator of the Federal Security Agency to the Chairmen of the House Committee on Interstate and Foreign Commerce and the Senate Committee on Interstate

Commerce appended to the reports of those committees on the proposed legislation (H. Rep. No. 1893, 77th Cong., 2d sess.; S. Rep. No. 1779, 77th Cong., 2d sess.) and also in the opinion of the Court of Appeals for the District of Columbia in *Farley* v. *Heininger,* 105 F. (2d) 79, decided April 17, 1939, certiorari denied, 308 U. S. 587, sustaining a fraud order issued under the postal laws against one of these laboratories.[3] The state laws generally were adequate to protect the public where the transaction was purely intrastate in character. But, the Senate committee pointed out—

> Under the existing law, the public policy of every State which has enacted health statutes described in the bill can be violated without remedy. Even where two or more States are side by side and all have passed such laws, a violator living in one State escapes the penalty of his deeds in the neighboring State. This bill proposes to stop such transactions by making it a Federal offense to do in interstate transactions what is prohibited in intrastate transactions. This bill does not change the rights or regulate the acts of any citizen which are confined to his own State. It does not impose a new Federal policy on any State.
>
> Its aim is to prevent frustration or evasion of State public health laws [S. Rep. No. 1779, p. 1].

[3] Efforts to curb the practice through the fraud provisions of the postal laws had not proved as effective as was thought desirable, apparently because of the necessity of proving fraud in each specific case (S. Rep. No. 1779, p. 2).

To remedy the evil, Congress, by the Denture Act, has made it an offense for anyone engaged in the business to which the legislation relates to "use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory" any denture which could not be supplied intrastate under its laws.

A. THE OFFENSE IS ONE WHICH CONTINUES SO LONG AS AND WHEREVER THE MAILS ARE "USED" FOR THE FORBIDDEN PURPOSE. HENCE, CRIMINALITY UNDER THE STATUTE DID NOT END AT THE MOMENT OF MAILING BUT CONTINUED UNTIL DELIVERY OF THE DENTURE IN DELAWARE

As is generally the case in determining the locality of federal crime, the resolution of that question in the present litigation turns upon the meaning which should be given the essential statutory verb[4]—in this case "use." There can be no quarrel with the analysis of the District Court that what the statute prohibits is "use" of the mails plus forbidden "purpose." Appellees "used" the mails at the moment they mailed the denture in Chicago, and they "used" them for the forbidden "purpose". Concededly they offended against the statute in the Northern District of Illinois. Where we part company with the District Court is when it holds that criminality under the statute ceased at the moment of mailing, even though "use" of the mails for the forbidden "purpose" continued until the denture was delivered to the addressee.

[4] Cf. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 Va. L. Rev. 287, 289.

The decision of the District Court thus freezes the crime at the beginning of the denture's interstate journey. We submit that the crime is one of movement and continues until the denture reaches the addressee in the state whose laws it was the purpose of the offender to flout.[5] The verb "use" in the phrase "use the mails" is undoubtedly employed in the Act in the sense of "convert to one's service;" "avail oneself of;" "employ;" "make use of."[6] Clearly one does not cease to "make use of" the mails until the use to which they are put is ended. In this case the "use" to which the mails were put did not cease with the mere deposit of the denture in the mails at Chicago. The purpose of the mailing was the transmission of the denture to Alice Harris in Delaware. Until that was accomplished the mails were still being used for the forbidden purpose.

The unjustified rigidity of the court's construction is emphasized when attention is directed to the fact that the statute covers not only "use" of the mails, but also "use" of "any instrumentality of interstate commerce," a factor to which the court below does not allude in its opinion. Certainly it cannot be said that "use" of an instrumentality of interstate commerce ceases at the moment the denture is delivered to the expressman, the railroad,

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[5] Of course, "use" of the mails may cease earlier if, through some adventitious circumstance, the denture is not delivered to the addressee.

[6] Webster's *New International Dictionary.*

or the motor carrier. No reason suggests itself why a narrower construction should be given where instead the mails are "used." The rule of strict construction of penal statutes does not require that language be so "cabined, cribbed, confined."[7]

Moreover, the prohibited denture is described in the Act (*supra*, p. 3) as any denture constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the State or Territory "into which such denture is sent or brought" to practice dentistry. It is, therefore, evident that Congress, in penalizing the "use" of the mails or an instrumentality of interstate commerce, was visualizing the normal situation whereby such "use" would result in the denture being delivered to the addressee. Presumably, it intended to penalize a "use" as broad as that which it had in mind. And, of course, the cardinal aim of the legislation, as the Senate Committee Report indicates (*supra*, p. 12), was to prevent the introduction into the states of destination of dentures which offend against their public health policies.[8]

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[7] *United States* v. *Hartwell*, 6 Wall. 385, 396; *United States* v. *Wurts*, 303 U. S. 414, 417; see also *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327; *Securities & Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344, 354–355, and cases cited.

[8] The statutory command is that the mails or instrumentalities of interstate commerce are not to be used for the purpose

In determining that the offense occurred at Chicago alone the District Court, in effect, reads the statute as though it provides not for the penalization of anyone who "uses the mails" for the forbidden purpose but of anyone who "deposits" the denture in the mails for the forbidden purpose.[9] There is hardly more justification for such a construction of the word "use" as employed in the Denture Act than there was for the interpretation, rejected in *United States* v. *Freeman*, 239 U. S. 117, of the word "ship" as meaning "deliver for shipment." In the *Freeman* case the statute construed (Criminal Code, Sec. 240; 18 U. S. C. 390) made it an offense knowingly to "ship or cause to be shipped from one State * * * into any other State, * * * or from any foreign country into any State" any package of intoxicating liquor not labeled as required by the statute. The shipment in question was made from the Western District of Missouri into the District of Kansas, and it was contended that the offense was "complete" when

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of sending or bringing offending dentures "into" those states. Cf. *United States* v. *Alaska Consol. Canneries*, 2 F. (2d) 614, 616 (W. D. Wash.).

[9] It should be pointed out, however, that when Congress has had in mind punishment for a "deposit in the mails," as distinguished from the continuing use of the mails, it has used apt words to express that intention. Cf. the Mail Fraud Statute (Criminal Code, Sec. 215; 18 U. S. C. 338):

"Whoever * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, *place*, or cause to be *placed*, any letter * * * in any post office * * * or authorized depositary for mail matter * * * shall be fined," etc. [Italics supplied.]

the package was delivered to the carrier for shipment in the Western District of Missouri and, therefore, could not be prosecuted in the Kansas district. In rejecting this contention, this Court said (p. 120):

> As usually understood, to ship a package *from* one State *into* another or *from* a foreign country *into* a State is to accomplish its transportation from the one into the other by a common carrier, and is essentially a continuing act whose performance is begun when the package is delivered to the carrier and is completed when it reaches its destination. We think it is to such an act that the statute refers. To reach a different conclusion the word "ship" must be read as if it were "deliver for shipment." No doubt it sometimes has that meaning, but it plainly is not so used in this instance. * * *[10]

The *Freeman* decision points also to an incongruity resulting from the construction which had been given by the District Court to the statute there involved which would likewise seem to obtain under

[10] Under the statute in the *Freeman* case the offense was probably not consummated until the shipment was delivered in the state of destination; here, as the District Court correctly held (R. 13), an offense was committed "at the moment of mailing because use plus purpose of sending or bringing into any State is what the statute prohibits." This difference, however, in no way impugns the force of the reasoning in the *Freeman* case that under comparable language the offense was not completed in the state in which the liquor was delivered for shipment.

the interpretation given the Denture Act by the court below. "Interstate commerce" is defined in the Denture Act as meaning "commerce between any State or Territory and any place outside thereof" (*supra*, p. 4). Evidently it is as unlawful to send or bring a nonconforming denture by an "instrumentality of interstate commerce" into a state or territory from a foreign country[11] as it is from another state or territory. The statute in the *Freeman* case, in similar manner, dealt "with shipping liquor from a foreign country into a State as well as with shipping it from one State into another State. It puts both upon the same plane and makes them equally criminal" (p. 120). For this reason, this Court said (p. 120):

> Whatever marks the completion of the offense in one likewise marks it in the other. If it be the delivery to the carrier in the case of interstate shipments it equally is this delivery in the case of shipments from a foreign country. And yet all will concede that Congress did not intend to do anything so obviously futile as to denounce as criminal an act wholly done in a foreign country, such as is the delivery to the carrier where the shipment is from a

[11] While the use of the term "interstate commerce" to embrace what is ordinarily called foreign commerce is perhaps unorthodox, an analogous laxity of expression also occurs in the Act's definition of "interstate commerce" as meaning "commerce within the District of Columbia or within any other Territory not organized with a legislative body" (*supra*, p. 4).

> foreign country into a State. So, if its words permit, as we think they do, the statute must be given a construction which will cause it to reach both classes of shipments, and thereby to accomplish the purpose of its enactment.

While the court below does not refer in its opinion to violations of the Denture Act by the use of "instrumentalities of interstate commerce," it is obvious that if the court's reasoning with respect to cessation of the "use" of the mails at the moment of mailing were carried over into the former field, the Denture Act would be deprived of application to nonmail shipments from a foreign country into a state, even though Congress would seem to have made the Act applicable to such shipments. The same dilemma would, of course, be presented if the denture were transmitted by mail from a foreign country. Any other holding with respect to "use" of an "instrumentality of interstate commerce" would be a recognition that "use" of the instrumentality would continue while the denture is in course of transmission in this country and until it reaches the addressee.

The construction below results in further incongruity. In line with its avowed object of rendering federal assistance to prevent circumvention of the dental laws of the states of destination, the Denture Act is, in terms, integrated with those laws (*supra*, p. 3). Naturally, the prosecuting officials who are

most familiar with such laws and their underlying policy are those in the states of destination. Yet the decision below deprives those officials of any active enforcement role and thrusts upon United States Attorneys in the states of origin, which may perhaps have no similar policy, the burden of informing themselves as to the laws of the state of destination [12] and of enforcing a policy in which they may have but an academic interest. In the state of destination resides also the Government's principal witness. It is impossible to believe that a construction of the statute so out of harmony with its vigorous enforcement was intended by Congress.

If, as we submit, criminality under the Denture Act did not cease at the moment of mailing but continued up to the point where the denture was delivered in Delaware, there can be no doubt that the offenders may be prosecuted in Delaware even though they also violated the statute at Chicago and could have been proceeded against in the Northern District of Illinois. It is not a novel concept in federal criminal law that an offense, because of its continuing character, may be committed in several districts, with the result that the Government has a choice of the place of prosecution, unless, of course, forbidden by some specific

[12] Indeed, in this very case appellees' demurrer and motion to quash raise many questions, not passed upon by the court below, as to the validity and construction of the Delaware dental statutes (R. 6–8; see R. 12).

venue provision, a factor not here existing.[13] In *In re Palliser*, 136 U. S. 257, which involved a use of the mails, this Court concluded (p. 267) that "the offence charged being an offer of money, or a tender of a contract for the payment of money, contained in a letter mailed in New York and addressed to a postmaster in Connecticut, to induce him to violate his official duty, it might admit of doubt whether any offence against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. But there can be no doubt at all that, if any offence was committed in New York, the offence continued to be committed when the letter reached the postmaster in Connecticut; * * * and that, in either aspect, the District Court of the United States for the District of Connecticut had jurisdiction of the charge against the petitioner." *Armour Packing Co.* v. *United States*, 209 U. S.

[13] The defendant is adequately protected in such a situation. As is evident from the decision of this Court in *Armour Packing Co.* v. *United States*, 209 U. S. 56 (see p. 23, *infra*), the Government may not, because of the continuing character of the criminal act, make it the basis of a separate charge in each district. The offense is a single, continuing offense, not a series of offenses, although it is continuously committed in each district in which the criminal act occurs. For this reason the Government is required to select the district in which it will proceed. See *Salinger* v. *Loisel*, 265 U. S. 224, 234; *Haas* v. *Henkel*, 216 U. S. 462, 474. And, since the crime is one, jeopardy, conviction, or acquittal in one district will bar another prosecution in either that or any other district.

56, was a prosecution under a provision of the Elkins Act (49 U. S. C. 41 (1)), which makes it an offense "for any person * * * to * * * receive any rebate * * * in respect of the transportation of any property in interstate * * * commerce by any common carrier" subject to the Interstate Commerce Act. The packing company was indicted in the Western District of Missouri for having received a rebate in connection with a shipment from Kansas City, Kansas, to New York City. The shipment had passed through the Western District of Missouri. The packing company contended (pp. 72–73) that the offense "was not committed in the Western District of Missouri, where the prosecution was had, but that the same was complete in Kansas City in the State of Kansas" and that the Act would be unconstitutional if it were construed to allow prosecution in any other federal district than the one in which the crime was already complete.[14] However, this Court held (p. 74) that "the transportation being of the essence of the offense, when it takes place, whether in one district or another, whether at

[14] While the Elkins Act contains (49 U. S. C. 41 (1)) a specific venue provision permitting prosecution in any district "through which the transportation may have been conducted," this provision could not, of course, serve to confer jurisdiction in some other district than the one in which the crime was complete.

the beginning, at the end, or in the middle of the journey, it is equally and at all times committed" and hence could be prosecuted in any of those districts. The Court pointed out (pp. 76–77) that, of course, repeated criminal charges could not be made in each district through which the transportation at an illegal rate was had, since the offense was "a single, continuing offense, not a series of offenses, although it is continuously committed in each district through which the transportation is received at the prohibited rate."[15]

The crime charged was one over which the District Court for the District of Delaware had general jurisdiction as a District Court of the United States.[16] And, since the crime in question

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[15] Other instances of federal crimes which were held to be punishable in any one of several districts because they were continuing in character and were hence committed in each district are: *United States* v. *Sperry*, 27 Fed. Cas. No. 16369, at 1282 (E. D. Mo.), removal of tax unpaid liquors; *Morris* v. *United States*, 229 Fed. 516, 521–522 (C. C. A. 8), larceny (see also *United States* v. *Folson*, 28 Fed. Cas. No. 16530, at 200 (C. C. D C.), *United States* v. *Haukey*, 26 Fed. Cas. No. 15328, at 227 (C. C. D. C.), and *United States* v. *Mason*, 26 Fed. Cas. No. 15738, at 1196 (C. C. D. C.)); *Smith* v. *United States*, 288 Fed. 44, 46 (C. C. A. 5), embezzlement by a railway mail clerk (see also *Perara* v. *United States*, 221 Fed. 213 (C. C. A. 8), and *In re Richter*, 100 Fed. 295, 298 (E. D. Wisc.).

[16] Section 24, paragraph Second, of the Judicial Code (28 U. S. C. 41 (2)), provides that "The district courts shall have original jurisdiction * * * Of all crimes and offenses cognizable under the authority of the United States."

was properly alleged to have been committed within the territorial limits of that district, there can be no basis for any objection that the venue provisions of the Constitution (*supra*, p. 4) were not met by prosecution in the District Court for Delaware.[17] That court is not deprived of venue by any venue provisions in the Denture Act, since there are none,[18] nor is venue taken away by any

[17] It is settled that the Constitution "does not require the prosecution of the defendant in the district wherein he may reside at the time of the commission of the offense, or where he may happen to be at that time, provided he is prosecuted where the offense is committed. The constitutional requirement is as to the locality of the offense and not the personal presence of the offender." *Armour Packing Co.* v. *United States*, 209 U. S. 56, 76; *Salinger* v. *Loisel*, 265 U. S. 224, 235; *Burton* v. *United States*, 202 U. S. 344, 387; *In re Palliser*, 136 U. S. 257, 265. Considerations of hardship "in permitting prosecutions in places distant from the home and remote from the vicinage of the accused" are matters for congressional, not judicial, concern. *Armour Packing Co.* v. *United States*, *supra*, at p. 77; *Hyde* v. *Shine*, 199 U. S. 62, 78; *Haas* v. *Henkel*, 216 U. S. 462, 473. It also has long been established that a person may be "constructively" present, for the purpose of establishing criminal jurisdiction or venue, in a state or district that he has not physically entered, by virtue of having set in motion a force that takes effect in that state or district. (See *In re Palliser*, 136 U. S. 257, 265–266; *Hyde* v. *United States*, 225 U. S. 347, 362; *Collins* v. *United States*, 65 F. (2d) 545, 547 (C. C. A. 5).) Appellees, by delivering the forbidden package to the Post Office Establishment in Illinois for delivery to the addressee in Delaware, constituted it, of course, their agent and made its acts theirs throughout the whole of the transportation proximately resulting, and thus directly caused a single continuous act which at every stage constituted a forbidden use of the mails.

[18] Cf., *e. g.* Secs. 338a (d), 338b (d), and 408d (d) of 18 U. S. C.

general statutory provision. Indeed, Section 42 of the Judicial Code, a general venue statute (*supra*, pp. 4–5), if it has any application, would preserve venue in the Delaware District Court.[19] It is, therefore, evident that Congress, in failing to incorporate any special venue provisions in the Denture Act, left the question of the place of prosecution to be determined by the application of ordinary venue principles, as, of course, it properly could,[20] or, perhaps, by reference to Section 42. Under either, assuming Section 42 to apply,

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[19] The court below regarded Section 42, evidently, as applicable only to an offense begun in one district and consummated in another (R. 13), as distinguished from an offense which, although already committed in one district, continues to be committed in another. The question is, we think, an arguable one. (Cf. *United States* v. *Midstate Co.*, 306 U. S. 161, 164–165, 166–167; *Hyde* v. *United States*, 225 U. S. 347, 360–361; *Benson* v. *Henkel*, 198 U. S. 1, 15; *United States* v. *Lombardo*, 241 U. S. 73, 77; *In re Palliser*, 136 U. S. 257, 267–268; *Smith* v. *United States*, 288 Fed. 44, 46 (C. C. A. 5). Of course, if the statute applies, it expressly authorizes prosecution in Delaware as the offense, although "begun" in the Northern District of Illinois, was not "completed" until delivery of the denture in Delaware. Since Section 42 bars prosecution in intermediate districts, the question of the application of that section would be of real importance, so far as the Denture Act is concerned, only if prosecution were attempted in any district in which "use" of the mails occurred other than the district of origin or the district of destination, a situation not here presented.

[20] Although there are almost 500 sections in Title 18, U. S. C., alone defining federal crimes, those assisting the draftsmen of the *Proposed Federal Rules of Criminal Procedure* were able to find less than forty sections dealing with venue in connection with specific crimes. See Second Preliminary Draft, Note to Rule 20, pp. 101–104.

prosecution in the District of Delaware was proper.

The court below stresses the failure of Congress to act upon the suggestion of the Postmaster General, in his letter of November 5, 1941, to Chairman Lea, of the House Committee on Interstate and Foreign Commerce, "that consideration should be given to the advisability of having the measure provide for prosecution of violators in the jurisdiction where the material is caused to be delivered as well as in the jurisdiction from which it is sent" (R. 14). The court treats this suggestion as an interpretation of the statute by the governmental department charged with its administration. It should be pointed out, however, that the hearings before the Senate and House subcommittees indicate that the legislation was not "sponsored" by the Post Office Department in the usual sense of that term, that the real impetus for the legislation came from the dental profession, although, it is true, an official of the Solicitor's Office of the Post Office Department suggested legislation to cure the evils at which the measure is directed in canvassing the situation with the Representative who introduced the bill, a dentist by profession, and that the views of each of several governmental departments and agencies interested in various phases of the general problem were secured.[21] And, of

[21] See, *e. g.*, pp. 2–3, 11, 15, 76–84, Hearing before a Subcommittee of the House Committee on Interstate and Foreign

course, as the Act is a criminal statute, enforcement of it is the ultimate responsibility of the Department of Justice. In any event, there is room for question as to whether the Postmaster General's observation was as much interpretation as it was merely a suggestion that the bill include a specific venue provision. The bill, of course, failed not only to provide venue in the state of destination but also in the state of origin. The failure of Congress to act on the suggestion, and, indeed, the complete silence on the matter in the Act's legislative history, may more reasonably be attributed, we believe, to the view that Congress regarded a venue provision as unnecessary and left the matter of the place of prosecution to be determined under ordinary venue principles or, perhaps, to the application of Section 42 of the Judicial Code, rather than to the view entertained by the court below that Congress must be deemed to have intended that venue be restricted to the district of origin.

The same considerations make irrelevant the observation of the court below (R. 14–15) as to the existence in some criminal legislation, particu-

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Commerce, February 3 and 4, 1942, 77th Cong., 2d sess., on H. R. 5674, Vol. 1; pp. 3, 13, 25, 88, 90, 91, 117, 138, 142, 145, Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, July 15, 16, 17, and 20, 1942, 77th Cong., 2d sess., on S. 2371, Vol. 2. [The two bills, H. R. 5674 and S. 2371, were identical. The House bill was passed upon being reintroduced as H. R. 6730. (See Senate Subcommittee Hearings, pp. 2–3; Senate Committee Report No. 1779, 77th Cong., 2d sess., p. 1; Cong. Rec., Vol. 88, Pt. 7, p. 9665).]

larly the Securities and Exchange Act, of specific venue provisions authorizing prosecution in the district in which an article is delivered.

It is also significant that in enacting analogous legislation designed to implement state policy Congress has not been consistent in the incorporation of specific venue provisions. Cf. the Webb-Kenyon Act (27 U. S. C. 122, 123) and the Bone Dry Act of March 22, 1933, c. 4, Secs. 6 and 7, 48 Stat. 16, 19, containing no special provisions on venue, with the Convict-Made Goods Act (18 U. S. C. 396b–396e), which has a provision permitting prosecution in the district "into which" the merchandise is transported. Thus, it appears that there is no congressional policy against prosecution in the state of destination rather than the state of origin under such legislation.

B. ON ANY OTHER PERMISSIBLE THEORY PROSECUTION WAS PROPERLY HAD IN DELAWARE

Our argument has proceeded on the basis that there was a continuing criminal offense during the entire course of the transmission of the denture through the mails, from its deposit in the mails at Chicago until its delivery to the addressee in Delaware. We think that this is the position which has to be taken to conform with that which is penalized—"use" of the mails or an instrumentality of interstate commerce for a forbidden purpose. We regard the words "State or Territory into which such denture is sent or brought" in

the portion of the statute describing the proscribed denture as a recognition on the part of Congress that "use" of the mails or an instrumentality of interstate commerce will, in the ordinary course, result in the delivery of the denture to the addressee, and, hence, as valuable in measuring the "use" penalized (see p. 15, *supra*). If, however, these words have any other significance, they can have but one or the other of two effects, neither of which disturbs our conclusion that it is proper to prosecute appellees in Delaware. They would mean either that Congress was creating an offense which was wholly or completely committed in Delaware, i. e., where the denture was delivered, or, probably sounder, an offense which, although it "began" when the denture was deposited in the mail, in Chicago, was not "completed," in the sense that it was not consummated, until the denture was delivered to the addressee, in Delaware. In the first instance venue could be laid in no other district than the District of Delaware. Cf. *Lamar* v. *United States*, 240 U. S. 60, 66; *United States* v. *Lombardo*, 241 U. S. 73, 77–79; *Burton* v *United States*, 196 U. S. 283, 304. In the second it could be laid in the Northern District of Illinois or the District of Delaware, at the option of the Government, under the precise terms of Section 42 of the Judicial Code. Cf. *Benson* v. *Henkel*, 198 U. S. 1, 15–16; *United States* v. *Freeman*, 239 U. S. 117, 121; *Hyde* v. *United States*, 225 U. S. 347, 360–361.

CONCLUSION

For the reasons stated, appellees were validly prosecuted in Delaware. We, therefore, respectfully submit that the judgment below should be reversed and the case remanded for further proceedings.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
W. MARVIN SMITH,
Special Assistant to the Attorney General.

SEPTEMBER 1944.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1944.

No. 43.

THE UNITED STATES OF AMERICA,
Appellant,

v.

MARGARET M. JOHNSON and MARY E. LAYTON, Doing Business as THE UNITED STATES DENTAL COMPANY, and VOYLE CLARK JOHNSON.

Appeal From the District Court of the United States for the District of Delaware.

BRIEF FOR APPELLEES.

H. ALBERT YOUNG,
ALEXANDER JAMISON,
Attorneys for Appellees.

VOYLE CLARK JOHNSON,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

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IN THE

Supreme Court of the United States.

No. 43. October Term, 1944.

THE UNITED STATES OF AMERICA,

Appellant,

v.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF DELAWARE.

BRIEF FOR APPELLEES.

The statement of the case, the manner in which the case is brought to this Court, the constitutional and statutory provisions involved, and the reference to the order of the District Court quashing both the original information and the amended information are correctly and sufficiently set forth in the Government's brief (pp. 1 to 8 inc.).

ARGUMENT.

I. Offense Complete at the Place of Mailing.

The Federal Denture Act prohibits the use of the mails for the purpose of sending or bringing prohibited matter into a state, the laws of which prohibit, etc. The significant words of the statute are, "to use the mails * * * for the purpose of sending or bringing into any state * * *". The statute contains no venue clause. The act of *using the mails* coupled with the *intent* of sending the prohibited mat-

ter into a state the laws of which prohibit, etc., is the crime, consisting of two elements which this statute was designed to punish. When this is done, the offense is complete. Thus, when the defendants *deposited* the dentures in the United States mails in the Post Office at Chicago, Illinois, *with the intent* of sending them to the State of Delaware, the offense was complete and triable in the District of Illinois and nowhere else! The meaning of the language in the statute is plain, and in the absence of a special venue provision, the alleged offense can only be prosecuted in the district where the crime was actually and wholly committed.

It is not an essential prerequisite to a valid conviction under this statute that the purpose or intent be in fact effectuated. Since the crime was *complete* at the place of sending with the proscribed purpose mentioned, the District of Illinois was the only place where the case could be tried.

The federal courts have frequently passed upon this very question of venue in a consideration of statutes closely analogous to the statute now before the court. Reference to those statutes[1] and those cases serves as persuasive authority in the interpretation of the Federal Denture Law which has now made its initial appearance before a federal court. It is evident from an examination of those statutes that where Congress intends that anyone violating the provisions of the law shall be prosecuted in the district where the proscribed matter was delivered, it has said so in plain and unmistakable language.

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[1] *Securities and Exchange Act*, Sec. 20 (b), 15 U. S. C. A. Sec. 77 (b);
The Anti-Lottery Act, as amended, 18 U. S. C. A., Sec. 336;
An Act Relating to the Advertisement of Intoxicating Liquors in Prohibited States; 18 U. S. C. A., Sec. 341, 345;
The National Motor Vehicle Theft Act, 18 U. S. C. A. Sec. 408;
The Elkins Act, 49 U. S. C. A., Sec. 41;
The Ashurst Sumners Act, 18 U. S. C. A., Sec. 396 (a).

The original *Anti-Lottery Act*, Sec. 3894 of the Revised Statutes U. S., Sec. 14, Criminal Code, enacted in 1872 provided that:

> "Any person who shall knowingly deposit or cause to be deposited or who shall knowingly send or cause to be sent anything to be conveyed or delivered by mail in violation of this section, etc., shall be deemed guilty of a misdemeanor * * *."

There is not a single reported case of a prosecution under the foregoing statute in any district other than in the district where the prohibited matter was deposited in the mails. No one will deny that the language of the foregoing statute containing the words, "cause to be sent anything to be conveyed or delivered by mail * * *" contemplates the use of the facilities of the United States Post Office for the purpose of sending or transmitting through the United States mails the matter prohibited by the statute.

In the *Anti-Lottery Act* as originally enacted in 1872 a person who knowingly caused to be sent anything to be conveyed or delivered by mail, etc., was deemed to have committed the offense wholly completed in the jurisdiction where the deposit in the United States mails was made.

Much force and reason may be given to this conclusion when we examine the *Anti-Lottery Act* as amended in 1890. The provision as amended was as follows:

> "Any person who shall knowingly deposit or cause to be deposited or who shall knowingly send or cause to be sent anything to be conveyed or delivered by mail in violation of this section *or who knowingly causes to be delivered by mail anything herein forbidden * * * shall be deemed guilty of a misdemeanor.*" (The italics indicates the words that were added by the amendment of 1890.)

The first reported case of a prosecution under the *Anti-Lottery Act* as amended was that of *United States v.*

Horner, 44 Fed. 677. The case arose in the Southern District of New York upon an application for an order removing Horner to the Southern District of Illinois. Judge Brown of the Circuit Court of Appeals pointed out that three distinct and separate offenses were created by the amended section above quoted:

(1) *Deposit* or cause to be deposited matter in the mail.

(2) *Send* such matter or causing to be sent by mail.

(3) Causing such matter to be *delivered* by mail.

The first and second offenses do not require for their completion that the matter deposited in the mail should be delivered to the person to whom it is addressed. The third offense does.

The first four counts in the indictment as Judge Brown construed them were based on the clause of the statute which related to the deposit of the forbidden matter, and they charged an offense which would not require for its completion that the matter so deposited should have been delivered. The fifth count, however, alleged that Horner had knowingly *caused to be delivered* by mail to Mrs. N. Schuchman at Belleville in the Southern District of Illinois a certain circular containing a list of prizes to be awarded at lottery. The offense alleged in that count was triable in the Southern District of Illinois and the order directing Horner's removal from New York to the Southern District of Illinois was affirmed by the United States Supreme Court (12 Sup. Ct. 522, 143 U. S. 207). Judge Brown in disposing of the fifth count in the indictment stated:

> "I have no doubt that the last count charges an offense which is not, and can not be completed without delivery of the matter by mail to the person to whom it is addressed * * * and when such delivery is made in accordance with the intent of the accused, the offense is committed in the place where the delivery is made."

The Supreme Court of the United States in affirming the decision in the *Horner Case, supra*, approved Judge Brown's conclusion that the *Anti-Lottery Act* as amended in 1890 created three distinct and separate offenses only one of which required for its completion that the matter deposited in the mails should be delivered to the person to whom it is addressed. In all other instances the depositing of the matter in the United States mails is a complete offense triable in the jurisdiction in which the matter was deposited.

To the same effect is the case of *United States v. Conrad*, 59 Fed. 458. The indictment in that case charged that the prohibited matter was deposited in the Post Office at New Orleans. There was no allegation that the defendant had caused such matter to be delivered to the addressee in the District of West Virginia nor any allegation that it was delivered. Judge Goff held that the offenses charged against the defendant were commenced and completed in the Eastern District of Louisiana if at all, and in so doing decided that Section 731 of the *Revised Statutes* (Sec. 42 of the Judicial Code) had no application to this case because it is only applicable when any offense against the United States is begun in one United States judicial district and completed in another. His opinion is as follows:

> "In the case of *United States v. Horner*, 44 Fed. 677, Judge Brown of the district court for the southern district of New York, in speaking of said section, said: 'Three somewhat different offenses are created by the section above quoted. (1) * * * (2) * * * (3) * * *' This construction has received the approval of the Supreme Court of the United States in *Horner v. United States*, 143 U. S. 207, 12 Sup. Ct. 407.
>
> "The first, second, fifth and six counts of the indictment now under consideration charge the offense as depositing or causing to be deposited, and placing and causing to be placed, the forbidden matter men-

tioned, in the mails, under the first classification alluded to. The third and fourth counts charge the sending of such matter and causing it to be sent by mail, under the second of said distribution of offenses. It thus appears that there is no count under the third group—that of knowingly causing such matter to be delivered by mail. * * * The offenses coming under the first and second groups, as I have mentioned them, do not require for their completion that the forbidden matter deposited in the mails, intended for transmission therein to the person directed, should be in fact transmitted or delivered. In order to convict the party accused of these offenses it is only necessary to prove that he knowingly deposited or caused to be deposited in the mails or knowingly sent or caused to be sent, anything to be conveyed or delivered by mail in violation of said section; and thus it seems that the offenses charged in this indictment were committed, if at all, in the eastern district of Louisiana." (p. 462)

Regarding the venue clause Judge Goff said:

"I come now to consider that clause of section 3894, as amended, which provides that: 'Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.' It will be observed that this clause does not create any new or additional offenses, but simply provides the mode of procedure, and the place of trial and punishment, for any person violating any of the provisions of said section. The offenses created by it (section 3894) I have already described. The clause I have just quoted must be construed in connection with a clause of sec-

tion 2 of article III of the Constitution of the United States, which reads as follows: * * * Also it must be considered in connection with the Sixth Amendment to the Constitution, reading as follows: * * * (pp. 465, 466). This amendment is to be liberally construed. Giving full effect to these constitutional provisions, as I must do, and regarding all legislation that conflicts therewith as null and void, as it is my duty to do, I must decline to enforce that clause of section 3894, as amended, that permits a person accused of crime to be prosecuted in a court held in a state and district other than the state and district in which the crime was committed. (p. 466)

"Nor do I understand the case of *In re Palliser*, 136 U. S. 257, 10 Sup. Ct. 1034, as does the district attorney. * * * It will be noted that the offense charged against Palliser was not the unlawful *mailing* of the prohibited matter, but was, in effect, that of attempting to bribe a postmaster in the discharge of his official duty. The Supreme Court said: 'It might admit of doubt whether any offense against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. But there can be no doubt at all that, if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut, and that, if an offense was committed in New York, an offense was committed in Connecticut; and that in either aspect the district court of the United States for the district of Connecticut had jurisdiction of the charge against the petitioner." (p. 465)

The present case arising under the Federal Denture Act falls within the category of those cases holding that an offense is punishable in the district where the crime was actually and wholly committed. As the learned court below pointed out:

> "In short, there was a completed criminal offense at the moment of mailing because use plus purpose of sending or bringing into any state is what the statute prohibits."

II. The Federal Denture Law Does Not Create a Separate and Distinct Offense in a District Other Than the District of Mailing.

We may now turn to those cases arising under the statute relating to the use of the mails in furtherance of fraudulent schemes (Sec. 5480 of the *Revised Statutes*, Sec. 215 *Criminal Code*) in general as distinguished from the *Anti-Lottery Statute* which relates to a particular species of fraud. As this statute read in the year 1898 when *United States v. Sauer*, 88 Fed. 249, was decided, the gist of the offense contemplated by Sec. 5480 was stated thus:

> "Whoever shall in and for executing such scheme or artifice or attempt to do so place or cause to be placed any letter, packet, writing * * * in any post office, branch post office or street or hotel letter box of the United States to be sent or delivered by the said post office establishment * * * shall be deemed guilty of a misdemeanor."

It did not contain the words "or who shall knowingly cause to be delivered by mail" and in that particular differed from Sec. 3894 as amended.

The defendant in the *Sauer* case, *supra*, argued that the indictment was based on Sec. 5840, while the government insisted that it could be regarded as based on Sec. 3894. Deciding against the government on that point, Judge Severens treated the indictment as based on Sec. 5840, and held that the words "to be sent or delivered by the said post office establishment" merely denote the *intent* with which the letter is placed in the post office, and those words alone are not sufficient to create the separate and distinct offense of causing the prohibited matter to be delivered.

The court concluded that the indictment could be prosecuted only in the District of Illinois where the fraudulent matter was placed in the post office and not in the Eastern District of Pennsylvania to which the prohibited matter was sent. To the same effect is the case of *United States v. Stever* (1911) 222 U. S. 167.

Following the decision in *United States v. Stever, supra*, Sec. 5480 was amended by adding the words "or shall knowingly cause to be delivered by mail according to the direction thereof." Since that amendment there appears to be no difference between Sec. 3894 (*Anti-Lottery Statute*) and Sec. 5480 (*Use of Mails to Defraud Statute*) with reference to venue.

Thus, after the amendment, but only by reason thereof, violations of this statute may be prosecuted in the district where the forbidden matter is delivered, if in fact it is delivered.

The cases of *Salinger v. Loisel*, 265 U. S. 224 (1924) and *Kay, et al. v. Snyder*, 20 Fed. (2d) 273 (1927), arose after the aforementioned amendment. In each of those cases the court pointed out that under the original statute (these indictments were based on Sec. 5480) the offense was complete when the letter was placed in the mail for transmission and the place of deposit was the place where the offense was committed regardless of where the letter was delivered or whether it was delivered at all; but the new clause inserted into the amended statute enlarged the original definition of the offense so that if the letter is delivered, the offense may be dealt with in the district of the delivery as that is the district in which the defendant caused it to be delivered.

The opinion of the court in the *Salinger* case, *supra*, was delivered by Mr. Justice Van Devanter who also wrote the opinion in the case of *United States v. Freeman*, 239 U. S. 117; 36 Sup. Ct. Rep. 32, upon which the government in the case at bar places strong reliance and to which we shall later refer at greater length. It is a significant

fact, that Mr. Justice Van Devanter did not once mention the *Freeman* case as authority for the conclusion reached by the court in the *Salinger* case.

The government now attempts to spell out of the phrase, "to use the mails" contained in the Federal Denture Act a meaning which would embrace three distinct and separate offenses, namely: *depositing, sending*, and *causing to be delivered*. In all kindred statutes relating to the use of the mails, the acts of depositing, sending and causing to be delivered were treated as three separate and distinct offenses.[2] It is an established principle of statutory construction that a statute should be construed in the light of previous legislation upon the same general subject. It is not consistent with the rules of construction which relate to the interpretation of statutes creating criminal offenses to enlarge and extend words beyond their ordinary plain natural import. An offense cannot be created or enlarged by the insertion in a statute of a venue clause, but where it is present, it may throw light on the meaning of the language defining the offense.

The phrase contained in the statute under consideration "to use the mails" means to employ or to avail oneself of the facilities of the United States Post Office. When once such use is made of the United States mails at the district of origin coupled with the intent denoted in the statute, the offense is complete. The phrase "to use" as employed in the Federal Denture Act does not contemplate the full and continued use of the facilities of the United States mails so that an offense is committed and completed not only in the district of origin and in the district of destination, but likewise in every district through which the forbidden matter passes. Certainly, the Act does not say so.

This brings us to the theory of "continuing use", or to put it another way, the theory of a "continuing offense."

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[2] See United States v. Horner (supra);
See United States v. Conrad (supra);
See United States v. Sauer (supra).

III. Theory of Continuing Offense Does Not Apply to the Case at Bar.

The general principle that one who commits a criminal act in one county, state or district may be held responsible for its continuous operation in another to which its effect extends does not apply to the case at bar.

The theory of a continuing offense is applicable only where the actual carriage or movement of the proscribed matter is the essential element of the offense. In every such case the offense is committed and cognizable in every district through which the matter moves in transit.

In the case of *Davis v. United States*, 43 C. C. A. 448, 104 Fed. 136, the defendant was indicted in Texas for obtaining by false billing and false representation at Cincinnati, Ohio, the transportation of goods from that city to Dallas in the State of Texas at less than the established rates in violation of Sec. 10 of the interstate commerce act as amended by Act March 2, 1889. An application for his removal to Texas for trial was presented to the court in Ohio on the ground that the offense was begun in that circuit and ended in the fifth circuit under Sec. 731, *although nothing occurred in the latter* except the completion of the transportation. The Circuit Court of Appeals of the Sixth Circuit held that the fraud was begun and completed in Cincinnati and that the offense was not indictable in Texas. Judge Day, later Justice Day, stated:

> "The reading of the indictment, as well as the facts stated in the bill of exceptions, shows that the acts alleged to have been committed by appellants were all done and performed in the City of Cincinnati, in the Southern District of Ohio. The false representation of the character of the goods, and the delivery for transportation, and every act directly alleged to have been done by appellants took place in that jurisdiction.
>
> "It is contended on the part of the Government that, while this may be true, the crime was not completed in the Southern District of Ohio, but that it re-

quired *transportation of the goods* * * * and that this was not completed until the goods reached their destination at Dallas; and that, therefore, the offense would be committed only when this transportation beyond state lines *is completed*, and the case would then come within the provisions of Sec. 731 Rev. Stats. U. S., which provides that:

"'When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined or punished in either district in the same manner as if it has been actually and wholly committed therein.'

"This section was intended to provide for that class of cases where the crime is not completed in one district, but *a separate and distinct act of commission essential to the crime* is committed in another district, in which case the statute provides that prosecution may be had in either district. That class of cases is illustrated in the case of *In Re Palliser*, 136 U. S. 257, in which the offense charged was an offer of money, contained in a letter mailed in New York and addressed to a postmaster in Connecticut, and where the Supreme Court held that the offense *continued to be committed* in Connecticut; it was there that the act of the accused *operated upon the mind of the postmaster;* and there it was that he received the proposal and the criminal act became effective.

"This brings us to consider what is the nature of the offense and where does it become complete. * * *

"It is not *transportation* of the goods which is prohibited and punished, but *the obtaining* of the transportation by means of false and fraudulent conduct is the gist of the offense. If the goods are accidentally lost, is the crime any the less committed when all the acts of the accused, with the intent and purpose to defraud have concurred to complete the offense? We

do not think that such was the intent of Congress in enacting this law." (Italics supplied.)

Thus the court rejected the theory of a continuing offense arising out of a continuing use of transportation facilities.

In the case at bar the employment or use of the mails or of any instrumentality of interstate commerce for the purpose of sending the matter into a state, the laws of which prohibit, etc. constitutes the gravamen of the offense. The offense is not to be regarded as committed in each and every district through which the proscribed matter passes. The decision in the *Davis* case, *supra*, rests on the fact that it was not the transportation of the goods that was prohibited and made unlawful but rather the act of obtaining the transportation by means of false and fraudulent conduct which is the gist of the offense.[3] The transportation is the result or the fruit borne by such act. So in the case before the court it is neither the movement of the forbidden matter through the mails nor the delivery of such matter into the state of destination that is prohibited and made unlawful but simply the use of the United States mails coupled with the purpose denounced by the statute.

In *United States v. Fowkes*, 53 Fed. 13 (3 C. C. A. 394), 135 Sup. Ct. 1053, 149 U. S. 789, the appellee, a freight claim agent of the Philadelphia & Reading Railroad Company, was accused of signing at Philadelphia a "line voucher" which would operate at a place in the State of Missouri as an allowance of a claim for a rebate in violation of Sec. 10 of the Act to Regulate Interstate Commerce. The Court said:

"If it be assumed, however, that he did sign an instrument which permitted an unlawful act, yet it is beyond question that, whatever he did, was done in Pennsylvania, and that his offense, if any, was *both begun and completed in that state*, and that he did not

[3] See also to the same effect *In re Belknap*, (D. C.) 96 Fed. 614, 616.

elsewhere in any manner charge, demand, collect or receive, from any person whatever, an unlawful compensation for the carriage or shipment of property as in the indictment is alleged." (Italics supplied.)

In 1903 the Act to Regulate Interstate Commerce was amended by the so-called *Elkins Act*, 49 U. S. C. A. Sec. 41, which expressly provided that the offense should be regarded as committed in any district through which the goods moved. Thus the *actual carriage* of the goods was made an essential element of the offense. That being so, the actual carriage of the goods might continue through several districts. The amendment also added a special venue clause.

Armour Packing Co. v. United States, 209 U. S. 56, upon which the government relies is not in point because it arose *after* the enactment of the Elkins amendment and was prosecuted in the district selected by the government by virtue of the venue section which provided that the prosecution may be in any district through which the unlawful transportation moves.

The Elkins Act is an example of a statute which contemplates that persons who violate the Act may be prosecuted in any district into which the goods were brought or through which the goods moved. Other examples are the *National Stolen Property Act*, Sec. 6, 184 U. S. C. A. Sec. 418; the *National Motor Vehicle Theft Act*, 18 U. S. C. A. Sec. 408. There is a venue or jurisdictional clause in all of those statutes.

It becomes necessary to distinguish cases where an offense was committed in both districts from cases where it was completed in the second district. Manifestly, as the court below pointed out, such cases are inappropriate here where the offense was completed in the district of mailing and where the statute invoked does not create an offense in a second or other district.

The government in support of its argument that the district of Delaware has jurisdiction over the present

case cites as one of its leading authorities the case of *In re Palliser*, 136 U. S. 257.

A statute, enacted in 1878, provided that no postmaster or other person intrusted with the sale or custody of postage stamps, stamped envelopes or postal cards shall sell or dispose of them except for cash. While this is a postal statute, it does not relate to the use of the mails.

Another statute made it a misdemeanor for any person to give, promise or offer any money or other thing of value, or to make or tender any contract * * * to any officer of the United States, with intent to influence him to commit or to aid in committing, or to allow, any fraud on the United States, or to induce him to do or omit to do anything in violation of his lawful duty. This is not a postal statute, except in the broad sense that it applies to postmasters as officers of the United States.

Palliser mailed a letter at New York addressed to the postmaster at Black Hall, Connecticut, making a proposal which, if the postmaster had accepted it, would have resulted in the sale of a large quantity of stamps on credit, under an arrangement by which the postmaster, whose pay was on a commission basis, might have received during a certain period more compensation than he was lawfully entitled to. This was construed as an attempt to bribe the postmaster, or at least to induce him to sell stamps on credit in violation of his duty.

It is doubtful whether Palliser could have been prosecuted in the Southern Ditsrict of New York, but that point was not expressly decided. In holding that "if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut; and that, if no offense was committed in New York, an offense was committed in Connecticut", the Supreme Court was dealing with the offense of *attempted bribery*—not the offense of unlawfully *using the mails*. The fact that Palliser used the mails in committing the offense charged against him was merely a collateral fact.

The rule of precedents is that a judicial decision is an authoritative precedent only for cases in the same class. The *Palliser* case is not in the same class with the case at bar.

Obviously, the government fails to distinguish between the meaning of the word "commit" which means "to do", such as depositing a letter or matter in the United States Post Office establishment, and the word "complete", such as employing or using the facilities of the United States mails with the purpose of doing something which the language of a statute specifically prohibits. When the latter is done, the offense has not only been committed but it has been actually and wholly completed.

Other cases in the same category with the *Palliser* case, *supra*, upon which the government relies and which are not at all in point are as follows:

Burton v. United States, 202 U. S. 344; (govt's brief p. 24)

Haas v. Henkel, 216 U. S. 462; (govt's brief p. 24)

Benson v. Henkel, 198 U. S. 1—15; (govt's brief p. 25)

IV. Section 42 of the Judicial Code Is Not Applicable.

Under Section 42 of the Judicial Code, 28 U. S. C. A. Section 103, an offense begun in one district and completed in another district may be tried in either district.

If the government actually intends to rely on Sec. 42 of the Judicial Code, the government's brief cites only one case which requires any notice.

United States v. Freeman, 239 U. S. 117; 36 Sup. Ct. Rep. 32.

This was an indictment under Sec. 240 of the Criminal Code (Act March 4, 1909, Comp. St. 1913, Sec. 10410) making it a punishable offense knowingly to "ship or cause to be shipped from one state, * * * into another state

* * * or from any foreign country into any state * * * any package of or containing intoxicating liquor of any kind, "unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents and the quantity contained therein."

The indictment was returned in the District of Kansas and charged the defendant with violating the statute by knowingly shipping and causing to be shipped from Joplin, Missouri, to Cherokee County, Kansas, six unlabeled trunks severally containing from twelve to fifteen gallons of intoxicating liquor. By a motion to quash and a demurrer, it was objected that the offense denounced by the statute was complete when the package was delivered to the carrier for shipment and therefore that the offense charged was not cognizable in the District of Kansas but only in the Western District of Missouri. The District Court sustained the motion to quash and the demurrer, and the Government appealed.

Justice Van Devanter stated:

> "As usually understood, to ship a package *from* one state *into* another, or *from* a foreign country *into* a state, is to accomplish its transportation from the one into the other by a common carrier and is essentially a continuing act whose performance is begun when the package is delivered to the carrier and is completed when it reaches its destination. To reach a different conclusion the word 'ship' must be read as if it were 'deliver for shipment.' No doubt it sometimes has that meaning, but it plainly is not so used in this instance. The statute deals with shipping liquor from a foreign country into a state as well as with shipping it from one state into another state. It puts both upon the same plane and makes them equally criminal. Whatever marks the completion of the offense in one, likewise marks it in the other. It puts both upon the same plane and makes them equally criminal. Whatever marks the completion of the

offense in one, likewise marks it in the other. If it be the delivery to the carrier in the case of interstate shipments, it equally is this delivery in the case of shipments from a foreign country. And yet all will concede that Congress did not intend to do anything so obviously futile as to denounce as criminal an act wholly done in a foreign country, such as is the delivery to the carrier where the shipment is from a foreign country into a state. So, if its words permit, as we think they do, the statute must be given a construction which will cause it to reach both classes of shipments, and thereby to accomplish the purpose of its enactment. United States v. Chavez, 228 U. S. 525, 57 L. Ed. 950, 33 Sup. Ct. Rep. 595. This, we think, requires that it be construed as referring to the continuing act before indicated whereby the transportation into a state is accomplished, whether the package comes from another state or from a foreign country. In this view the completion of the offense will always be within a jurisdiction where the statute can be enforced.

"The District Court rightly recognized that, under Judicial Code, Sec. 42 (36 Stat. 1913, Sec. 1024) formerly Rev. Stat. Sec. 731; the offense charged was cognizable in the district of Missouri, if the place to which the packages were transported was the place of the completion of the offense. Therefore, nothing need be said upon that point."

It is interesting to observe that according to the reasoning of the court in this case, the delivery of the goods to the carrier at the point of origin *with no further transportation thereof* would constitute no offense at all. On the other hand, under the plain unmistakable language contained in the Federal Denture Law the mere mailing of the dentures for the proscribed purpose in the Northern District of Illinois does constitute an offense actually and

wholly completed therein regardless of transportation or of movement through the mails or of whether such matter ever reached the state of destination.

In the *Freeman* case, *supra*, the court held that the District of Missouri would have jurisdiction of the offense only if the goods delivered for shipment had reached the point of destination for the reason that the court held to the proposition in construing the statute under consideration in that case that delivery of the goods for shipment is not a complete offense, and that before the offense under the statute can be completed, transportation into the state into which it is sent must be accomplished. When that is done, then Sec. 42 of the Judicial Code may be invoked for the reason that an offense begun in one district and completed in another district may be tried in either district.

The Federal Denture Law creates but one offense consisting of two elements: the act of using the mails coupled with the intent expressed in the statute; not two separate offenses nor a continuing offense.

The court in the *Freeman* case, *supra*, was not confronted as the government attempts to show (p. 16 of its brief) with the duty of interpreting the meaning of the word "ship." The context of the statute on the contrary contained the phrase "to ship from one state into another or from a foreign country into a state * * *." It reached the conclusion that to "ship from one state into another or from a foreign country into a state" is to accomplish its transportation from one into the other by a common carrier and is essentially a continuing act whose performance is begun when the package is delivered to the carrier and is completed when it reaches its destination. The court, nevertheless, went on to say that the word "ship" in and of itself sometimes does mean "deliver for shipment", but it could not be given that meaning in the *Freeman* case because of the context surrounding the word in the statute.

One may "use" the mails without effectuating ultimate delivery or transportation into the state of destination; but one cannot, as the *Freeman* case holds, ship *from* one state *into* another state without effectuating the transportation into the state of destination.

The government on pages 17 and 18 of its brief advances an argument which is entirely unsound because it is based upon the assumption that the language of the statute involved in the *Freeman* case was comparable to the language of the Federal Denture Law, which we have already shown is not the case. Proceeding upon that false assumption, the government points to what it calls an incongruity resulting from the construction which the court below has given to the Denture Act. The government goes on to say that evidently it is as unlawful to send or bring a non-conforming denture by an instrumentality of interstate commerce into a state or territory from a *foreign* country as it is from another state or territory. The defect in that argument is that the Federal Denture Act is not a regulation of foreign commerce.

The indictment in the *Freeman* case was based on the Webb Kenyon Act[1] which expressly applies to shipments from foreign countries. The court's decision was chiefly based upon that fact. The Denture Law does not apply to shipments from foreign countries. Congress attempted to make it apply to foreign commerce by defining interstate commerce as "commerce between any state or territory and any place outside thereof." While Congress has a wide latitude in the matter of statutory definitions, there must be some limit beyond which the legislative body cannot go. We do not think that Congress has any power to define as interstate commerce that which plainly is not interstate commerce. Congress cannot regulate "commerce with foreign nations" without expressly so providing. To do so is plainly in violation of the Federal Constitution which deals with the power of regulating "commerce among

[1] 27 U. S. C. A., Sec. 122, ch. 6, p. 107 supp.

the several states" and the power of regulating "commerce with foreign nations", as distinct subjects. The term "interstate commerce", *co nomine*, is not used in the Federal Constitution; it is simply a convenient appellation for that which the Constitution (Article I, Section 8) defines as "commerce among the several states." Congress has no more power to change that definition than it has to change the definition of treason given in Article III, Section 8 of the Constitution. The distinction between interstate commerce and foreign commerce, made by the Constitution itself, cannot be obliterated by an Act of Congress. This raises a question which, so far as we can find, has never been passed upon by any court; probably because no other statute has attempted to say that foreign commerce shall be included in the term "interstate commerce." The government admits (Govt's brief p. 18) that the use of the term interstate commerce "to embrace what is ordinarily called foreign commerce is perhaps unorthodox."

V. The Legislative Body Must Be Presumed to Have Intended What It Has Expressed.

The meaning of the language in Federal Denture Act is plain and in the absence of a special venue provision the alleged offense must be prosecuted in the district where the crime was actually and wholly committed. The construction of the statutes involving the use of the mails is controlling. There is indeed much persuasive evidence that Congress intended to condemn the use of the mails at the place where the prohibited matter is deposited. The Postmaster General expressed the opinion that the statute does not provide for the prosecution of the violator in the jurisdiction where the material is caused to be delivered. The following letter was written to the Chairman of the Committee of Interstate and Foreign Commerce in the House of Representatives by the Postmaster General:

"OFFICE OF POSTMASTER GENERAL

Washington, D. C., November 5, 1941.

Hon. Clarence F. Lea,
Chairman, Committee on Interstate and
Foreign Commerce, House of Representatives.

My dear Mr. Lea:

Your letter of September 18, 1941, requested a report upon H. R. 5674, a bill to protect the public health by the prevention of certain practices leading to dental disorders; and to prevent the circumvention of certain State laws regulating the practice of dentistry.

This Department has no objection to the enactment of this proposed legislation. However, it is believed that consideration should be given to the advisability of having the measure provide for prosecution of violators in the jurisdiction where the material is caused to be delivered as well as in the jurisdiction from which it is sent.

It has been ascertained from the Bureau of the Budget that this report is in accord with the program of the President.

Very truly yours,

FRANK C. WALKER,
Postmaster General."

H. R. 5674, 77th Congress, First Session is referred to in the Congressional Record as of September 17, 1941. It contains the statute which was before the Postmaster General and which he suggested should be rewritten so as to contain a venue provision. Three months later when the Subcommittee of the House commenced its hearing on February 3, 1942, the statute in the form in which it appears in H. R. 5674, and in its present form as enacted was introduced before the Subcommittee, together with the recommendation of the Postmaster General.[5] Likewise the Sub-

[5] See hearing of Subcommittee on H. R. 5674, pp. 1-2.

committee of the Senate commenced its hearings on July 15, 1942, and it had the identical statute before it.* The Postmaster General's suggestion was neither considered nor acted upon.

As Judge Leahy of the District Court (R. 14) in disposing of the question said:

> "This is significant for I do not think that Congress should be presumed to have intended that the statute should have a meaning at war with the interpretation of the Governmental Department charged with its administration. This precludes, I think, a holding that Congress used the words of the statute in other than their plain and ordinary meaning.
>
> "*Moreover, if Congress had intended that violation could be prosecuted in the district in which the articles were delivered, it could easily have said so as it had done in several prior instances.*" (Italics supplied.)

The failure of Congress to insert a venue provision in the statute may well indicate as the government itself admits (govt's brief p. 27) that Congress regarded a venue provision as unnecessary and left the matter of the place of jurisdiction to be determined under ordinary venue principles; and under the ordinary venue principles in a case of this kind where the offense is committed and completed at the place where the forbidden matter is placed in the United States mails, the district of origin alone has jurisdiction of the offense. Sec. 42 of the Judicial Code cannot be invoked because, as it has been pointed out previously, that section can only be applied to offenses incomplete though begun in one district and completed in a second district.

In the case of *United States v. Struel*, 99 Fed. (2d) 474 (p. 478), Learned Hand, J., said:

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* See hearings before Subcommittee on S. 2371, pp. 1-2.

> "Trial by jury certainly for the graver crimes has a high place in our traditions. Around it cluster many memories of freedom won at large cost. Its surrender is not to be lightly imputed to the accused. The interest it takes in a jury of twelve is no greater than that in a jury of the vicinage—especially in the smaller center of population where a man may be known and where he is at home. Of the two, it is indeed the less important and if consent is necessary for the surrender of one, consent is equally necessary for the other."[7]

VI. Penal Statutes Are Strictly Construed.

This principle is so well established that the cases in support of it are legion. Sutherland on Statutory Construction, Sec. 3305.

In the case of *United States v. Novack*, 271 U. S. 201, the Court said:

> "Statutes will not be read to create crimes, or new degrees or classes of crimes, unless the purpose so to do is plain."

We shall not take up the court's time citing any more of those cases. We are content to accept the view of the District Judge:

> "I shall not pause to discuss the fundamental rule of strict construction of criminal statutes as an additional support to the defendants' contention."

CONCLUSION.

The question before the court is whether a prosecution for a violation of the Federal Denture Act by using the

[7] See also the observations by Judge Goff in *United States v. Conrad*, supra, that a venue clause simply provides the mode of procedure; and if construed in such a manner as to enlarge the offense or to create a new offense, it might be null and void as being in conflict with Sec. 2, Article III of the Constitution and the Sixth Amendment (ante pp. 5-7).

mails may be brought in the district in which the denture is delivered through the mails or in the district only in which the denture is deposited in the mails with the proscribed purpose denounced by the statute. The determination of that question turns on the meaning of the phrase "to use the mails * * * for the purpose of sending or bringing into any state etc. the laws of which prohibit etc."

The appellees contend that when the denture was deposited in the United States mails in the Northern District of Illinois for the purpose of sending such denture into the State of Delaware, the offense was committed and completed in the Northern District of Illinois and that the District of Delaware did not acquire jurisdiction of the case. The statute under consideration contains no venue clause. The delivery of the denture or its actual movement or carriage through the mails is no essential element of the offense. It is the act of mailing coupled with the purpose of sending the denture into the State of Delaware which constituted the offense and which the statute was designed to punish.

The theory of a continuing offense advanced by the government does not apply to the case at bar because in all cases falling within that category the offense in order to be construed as a continuing one must be such as to contemplate that the proscribed matter deposited in the United States mails should reach its destination from the point where the deposit was made or, to put it another way, must be such as to contemplate actual transmission through the mails or actual carriage by an instrumentality of interstate commerce in order for it to be punishable. In cases of this character, the transportation or the carriage or the movement of the proscribed matter in transit is the essential element of the crime. Furthermore, in every such case the offense is committed and triable in every district through which the proscribed matter passes.

There is nothing in the Federal Denture Act to indicate that Congress intended to make the delivery or the actual carriage of the proscribed matter an essential ele-

ment of the offense. As in the Anti-Lottery Statute, when Congress intended that the act of causing the proscribed matter to be delivered constitute a separate and distinct offense, it has done so by amendment in plain and unmistakable language. The theory of a continuing offense has been applied to cases arising under commercial statutes where actual transportation is the primary and essential ingredient of the offense, but it has never been applied to any postal statute. Some of the postal statutes (Sec. 3894 and 5480) as they now read, though not as originally enacted, contain a venue clause but they authorize prosecution either in the place of deposit or the place where the prohibited matter is delivered by mail and not in any district through which it is carried. The act of mailing the proscribed matter coupled with the intent expressed in the statute having been committed in the District of Illinois, the offense was completed, and the Northern District of Illinois was the only district where the offense could be tried. There was but one commission of the offense and there could be only one place where the offense could be tried, namely, the Northern District of Illinois.

The only manner in which the District of Delaware could have jurisdiction of this case is to spell out a separate and distinct offense with regard to delivery as was done in the Anti-Lottery Act as amended, or construe the meaning of the language contained in the Federal Denture Act by relying upon the theory of its being a continuing offense which we have shown is inappropriate here, or by resorting to the principles of Sec. 42 of the Judicial Code which in this case do not apply. Situations falling within that category of cases apply only to offenses incomplete when begun in one district and effectuated or completed in another district. So far as the applicability of Sec. 42 is concerned, the government gives away its own case by the following admission on page 13 of its brief:

> "Concededly, they offended against the statute in the Northern District of Illinois."

Since they offended in the Northern District of Illinois, nd the crime was completed in that district, the govern- ment's contention bottomed on Sec. 42 of the Judicial Code ails.

Reliance on Section 42 of the Judicial Code is an dmission that the Denture Act does not, by its own terms, reate an offense which can be prosecuted in the District f Delaware. Likewise, the fact that the Government is ttempting to write into the Denture Act the principle of continuing offense is also an admission that the statute oes not, by its own terms, define a continuing offense. he prosecution of the appellees in the District of Dela- ware can only be justified by reference to the express terms f the statute itself.

We are not unmindful of the fact that a penal statute ay also be a remedial statute, in which case it might be onstrued liberally with reference to its objectives only. In he present case, however, the validity of the statute is not efore the Court and the objectives thereof are not at issue. or the purpose of argument we admit by our demurrer violation under the terms of the statute begun and com- leted in the Northern District of Illinois. We are not rguing for a strict construction of the statute to aid us n showing that the appellees have not violated the statute. he sole question, therefore, presented to this Court is the uestion of venue, and on that question the statute should e strictly construed against the Government and in favor f the accused.

The District of Delaware is not the place where the ffense occurred nor is it the place where the offense al- eady begun, although incomplete, was consummated. Nor oes it fall within the category of those cases contemplating continuing offense, that is, a force set in motion which in rder for it to be effectuated must reach its destination. oth theories urged by the government are clearly inap- ropriate to the case arising under the Federal Denture ct.

It is plain that in this case the offense, if any, was begun in the Northern District of Illinois and was completed in the Northern District of Illinois and that the District of Delaware does not have jurisdiction.

For the foregoing reasons the appellees respectfully submit that the judgment below should be affirmed.

H. ALBERT YOUNG,
ALEXANDER JAMISON,
Attorneys for Appellees.

VOYLE CLARK JOHNSON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 43.—October Term, 1944.

The United States of America, Appellant, *vs.* Margaret M. Johnson and Mary E. Layton, Doing Business as the United States Dental Company and Wyle Clark Johnson.	Appeal from the District Court of the United States for the District of Delaware.

[December 18, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case concerns the construction of the Federal Denture Act of 1942, 56 Stat. 1087, 18 U. S. C. § 420(f)(g)(h) (Supp. 1943), which provides that ". . . it shall be unlawful in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in interstate commerce, to use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into . . ." a State or Territory any denture the cast of which was taken by a person not licensed to practice dentistry in the State into which the denture is sent. An information, filed October 4, 1943, in the District Court for the District of Delaware, charged that appellees put into the mails at Chicago for delivery in Houston, Delaware, dentures in violation of the Delaware laws pertaining to dental practice, and thereby violated the Federal Denture Act. The information was quashed on the ground that prosecution of appellees could only be had where the illegal dentures were deposited. 53 F. Supp. 596. A second information, adding counts alleging transmission into and delivery in Delaware, was quashed by entry of a formal order referring to the court's earlier opinion.[1] The Government has appealed directly to this Court under the Criminal Appeals Act, 34 Stat. 1246, as amended, 18 U. S. C. § 682 (Supp. 1943).

[1] We are concerned only with this latter information, but the court's opinion, delivered in connection with the first information, gave its reasons for quashing both informations.

Must these appellees be tried in the Northern district of Illinois or may they be tried in the district of any State through which the dentures were carried including Delaware, the place of delivery? Has Congress authorized such discretion in the enforcement of this Act? If it has, there is an end to the matter, for Congress may constitutionally make the practices which led to the Federal Denture Act triable in any federal district through which an offending denture is transported. *Armour Packing Co.* v. *United States*, 209 U. S. 56. An accused is so triable, if a fair reading of the Act requires it. But if the enactment reasonably permits the trial of the sender of outlawed dentures to be confined to the district of sending, and that of the importer to the district into which they are brought, such construction should be placed upon the Act. Such construction, while not required by the compulsions of Article III, § 2 of the Constitution and of the Sixth Amendment, is more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes.

Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the Framers wrote into the Constitution that "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . ." Article III, § 2, cl. 3. As though to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed." Sixth Amendment. By utilizing the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. Thus, an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district. Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.

These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately

rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

It is significant that when Congress desires to give a choice of trial, it does so by specific venue provisions giving jurisdiction to prosecute in any criminal court of the United States through which a process of wrongdoing moves. Such was the situation in *Armour Packing Co.* v. *United States*, *supra*. The offense there was under the Elkins Act for the transportation of goods at illegal freight rates, and Congress specifically provided for prosecution in any district "through which the transportation may have been conducted". 32 Stat. 847, as amended, 49 U. S. C. § 41 (1).

In the Federal Denture Act Congress did not make provision for trial in any district through which the goods were shipped. The absence of such a provision would in itself be significant. Its significance is enhanced when it appears that the attention of Congress was directed by the Postmaster General to the desirability of authority for a discretionary trial either at the place of shipment or at the place of receipt. He wrote to the Chairman of the House Committee on Interstate and Foreign Commerce "that consideration should be given to the advisability of having the measure provide for prosecution of violators in the jurisdiction where the material is caused to be delivered as well as in the jurisdiction from which it is sent". Hearings before Subcommittee of House Committee on Interstate and Foreign Commerce on H. R. 5674, 77th Cong., 2d Sess. (1942) p. 3. And the Committee also invited the viewpoint of representatives of the Department of Justice "on the language of the bill". *Id.* at 28. In view of the keen awareness of enforcing officials as well as that of the members of the Committee on Interstate Commerce of the problems raised by venue in criminal trials, it is inadmissible to suggest either oversight on the part of Congress in failing to make provision for choice

of venue or to make the cavalier assumption that that which is specifically provided for in other enactments—*i. e.*, trial in more than one district—was authorized but through parsimony of language left unexpressed in the Federal Denture Act.

The absence of a venue provision such as that which Congress wrote into the Elkins Act is far more rationally explained by due regard to the difference between the offenses under the Elkins and the Federal Denture Acts respectively. The venue provision under the Elkins Act underlines the offense defined by that Act, which was not the illegal sending or the bringing of goods but their "transportation". That—transportation—is inescapably a process, a continuing phenomenon. The Federal Denture Act did not make "transportation" the offense. It proscribed the use of the mails for "the purpose of sending or bringing into any State" unlawful dentures. The Act thereby hit two types of violators—the sender and the unlicensed dentist who brings in dentures from without. It is a reasonable and not a strained construction to read the statute to mean that the crime of the sender is complete when he uses the mails in Chicago, and the crime of the unlicensed dentist in California or Florida or Delaware, who orders the dentures from Chicago, is committed in the State into which he brings the dentures. As a result, the trial of the sender is restricted to Illinois and that of the unlicensed dentist to Delaware or Florida or California. The illicit sender in Chicago cannot be hauled for trial across the continent, and, conversely, the unlicensed dentist cannot be compelled to stand trial in Chicago.

The large policy back of the constitutional safeguards counsels against the unrestricted construction for which the Government contends when Congress has not commanded it; and no considerations of expediency require it. Prosecutions of federal crimes are under the general supervision of the Attorney General of the United States; United States Attorneys do not exercise autonomous authority. The vindication of the Federal Denture Act therefore does not depend upon the willingness of some local United States Attorney to prosecute on behalf of a local victim. While it might facilitate the Government's prosecution in a case like this to have its witnesses near the place of trial, there must be balanced against the inconvenience of transporting the Government's witnesses to trial at the place of the sender the serious hardship of defending prosecutions in places remote from home (including the accused's

difficulties, financial and otherwise, see R. S. § 878, 28 U. S. C. § 656, of marshalling his witnesses), as well as the temptation to abuses, already referred to, in the administration of criminal justice. Inasmuch as the statute permits and does not forbid this construction, the judgment below should be affirmed.

Affirmed.

Mr. Justice MURPHY, concurring.

I join in the opinion of the Court and believe that the judgment should be affirmed.

Congress has the constitutional power to fix venue at any place where a crime occurs. Our problem here is to determine, in the absence of a specific venue provision, where the crime outlawed by the Federal Denture Act occurred for purposes of venue.

The Act prohibits the use of the mails for the purpose of sending or bringing into any state certain prohibited articles. It is undisputed that, when a defendant places a prohibited article in the mails in Illinois for the purpose of sending it into Delaware he has completed a statutory offense. Hence he is triable in Illinois. But to hold that the statutory crime also encompasses the receipt of the prohibited article in Delaware, justifying a trial at that point, requires an implication that I am unwilling to make in the absence of more explicit Congressional language.

Very often the difference between liberty and imprisonment in cases where the direct evidence offered by the government and the defendant is evenly balanced depends upon the presence of character witnesses. The defendant is more likely to obtain their presence in the district of his residence, which in this instance is usually the place where the prohibited article is mailed. The inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use. Moreover, they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputations. Such factors make it difficult for me to conclude, where Congress has not said so specifically, that we should construe the Federal Denture Act as

covering more than the first sufficient and punishable use of the mails insofar as the sender of a prohibited article is concerned. The principle of narrow construction of criminal statutes does not warrant interpreting the "use" of the mails to cover all possible uses in light of the foregoing considerations.

Mr. Justice REED, dissenting.

The statute under consideration condemns the "use" of "the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory" any denture which has been made without compliance with the laws of that State or Territory relating to the furnishing of such appliances. The Court narrowly interprets the term "use" to condemn as criminal only the first use of the mails; in this way the Court restricts venue for prosecution to Illinois for trial of an offender who mails a denture in Illinois which is subsequently delivered through "use" of the mails in Delaware. We think, however, that the statute condemns and makes criminal any use of the mails for the prohibited purpose. Under this interpretation the respondents' use of the mails is punishable in Delaware and the dismissal of the information in this case should be reversed.

The venue of a crime may be fixed at any place where the acts denounced as crimes occur.[1] There is no disagreement as to this rule of law. The Court reaches its conclusion upon venue under the Federal Denture Act not upon any compulsion of Constitution or statute but because a restriction of the venue to the place of mailing seemed to it more consonant with the underlying purposes of the Constitutional provisions as to venue. These purposes are thought, as the Court expresses it, to include a trial in an environment which is not alien to the accused.

We think the Court misapprehends the purpose of the Constitutional provisions. We understand them to assure a trial in the place where the crime is committed and not to be concerned with

[1] Constitution of the United States, Art. III, Sec. 2, cl. 3; Sixth Amendment. Armour Packing Co. v. United States, 209 U. S. 56, 73-77; Salinger v. Loisel, 265 U. S. 224, 232-235; Horner v. United States, No. 1, 143 U. S. 207, 213; In re Palliser, 136 U. S. 257, 265; Hyde v. Shine, 199 U. S. 62, 78; Haas v. Henkel, 216 U. S. 462, 473.

domicile of the criminal nor with his familiarity with the ironment of the place of trial. *Haas v. Henkel*, 216 U. S. 462. leed in the present information nothing appears as to residence domicile of the accused or as to their place of business.

Congress by its specification of the precise acts denounced as nes fixes venue at the place where those acts are committed. e inquiry, then, must be directed to a determination of what stitutes the crime denounced by the Denture Act. The statute demns as unlawful the "use" of the "mails or any instrumtality of interstate commerce for the purpose of sending or nging into any State" the prohibited dentures. It is not the posit of the article or its delivery which is forbidden but the e of the transportation facilities. The sending or bringing of e dentures is not denounced as a substantive crime apart from e use of mails or instrumentalities to accomplish the purpose. e crime consists of the use of the mails to send a prohibited nture "into" or bring it "into" another state. The language ds us to the conclusion that a use for the prohibited purpose rs at whatever place the proscribed denture is handled by the ils or an instrumentality of commerce.

The "use" for the "purpose" results in a continuous offense.[2] nce the offense is committed wherever the mails or the instrumentalities of interstate commerce are used for the purpose of nding or bringing the denture into a state contrary to the tute and the act has no provision otherwise limiting the place trial, the venue is at whatever place these acts are committed. e of the places in the present case is Delaware "into" which e dentures were brought by appellees' use of the mails in that e. If this analysis is correct, there was no occasion for Conss to follow the suggestion as to venue of the Postmaster General which the Court refers.

Cf. United States v. Kissel, 218 U. S. 601; Hyde v. United States, 225 S. 347, 360-67; United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 250; re Snow, 120 U. S. 274; Clark & Marshall, Crimes (4th Ed.), § 504(d); arton Criminal Law (12th Ed.), § 328. See also In re Richter, 100 Fed. 298; Morris v. United States, 229 Fed. 516, 521.

Cf. Armour Packing Co. v. United States, 209 U. S. 56, 72-74; United tes v. Midstate Co., 306 U. S. 161, 165; and see United States v. Lombardo, U. S. 73, 77; United States v. Freeman, 239 U. S. 117, and In re ser, 136 U. S. 257. The latter two cases illustrate the difference been a continuous offense and one begun in one state and completed in ther. Compare Judicial Code, Section 42, 28 U. S. C. § 103, with § 3237 H. R. 5450, 78th Cong., 2d Sess.

The title of the act indicates that it is directed at practices thought to lead to dental disorders and "to prevent the circumvention of certain State or Territorial laws regulating the practice of dentistry." 56 Stat. 1087. These state laws regulated the fabrication of prosthetic dental appliances. From the hearings[4] it is clear that the purpose of Congress was to protect the public against the evils of ill-fitting dental appliances by restricting interstate commerce to dental appliances which were approved by licensed practitioners of the state into which the appliances were brought. Such was declared to be its purpose by the report of the Senate Committee. S. Rep. No. 1779, 77th Cong., 2d Sess., p. 1. As the injury would occur normally at the place of delivery and as the act is designed to protect only those states which have laws regulating the furnishing of appliances by unlicensed practitioners, Congress would naturally enact legislation which might punish violations in the state of delivery. The prosecuting officers of that state would be most interested in enforcement and would best understand the scope of the laws of the state of delivery. Congress would not wish to leave immune shipments from foreign countries. Cf. *United States* v. *Freeman*, 239 U. S. 117.

The CHIEF JUSTICE, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this dissent.

[4] Hearing before a Subcommittee of the House Committee on Interstate and Foreign Commerce, February 3 and 4, 1942, 77th Cong., 2d Sess., on H. R. 5674; Hearing before a Subcommittee of the Senate Committee on Interstate Commerce, July 15, 16, 17 and 20, 1942, 77th Cong., 2d Sess., on S. 2371.